Petition

81-1126

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TRUCK DRIVERS AND HELPERS LOCAL UNION
No. 728

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioners,

vs.

JOHN T. ALLEN, *et al*

and

TERMINAL TRANSPORT COMPANY, INC.

and

UNITED STATES OF AMERICA and EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

Petition for a Writ of Certiorari To The United State Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

1.

May a United States District Court substitute its notion of a "fair allocation of fees" for the statutory standard provided in 42 U.S.C. §2000e-5(k) with regard to attorney's fees?

Specifically, in a Title VII civil rights case, where Plaintiffs were denied all relief sought against Defendant unions (but prevailed in obtaining substantial relief against Defendant employer), did the Court err in requiring prevailing Defendant labor unions to pay one third of Plaintiffs' attorney's fees and expenses?

2.

Must labor union defendants, exonerated of all claims of violation of civil rights statutes and remaining in the case only as Rule 19 defendants, pay one half the fee of a Master to whom the District Court referred certain issues?

3.

Upon grant of certiorari on the above two points, Petitioners will request the Court also to consider whether Defendant unions, exonerated of all claims of wrongdoing in costly, protracted litigation extending over one half of the nation from 1972 to 1980, should be denied their costs[1] against the Government and EEOC.

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[1] We make no claim for attorney's fees. See *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). We do seek conventional costs from the Government, for we prevailed on all allegations made against us by the Government.

LIST OF PARTIES

Truck Drivers and Helpers Local Union No. 728.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

"John T. Allen, Willie Beasley, William Bing, Clarence Butts, Charles Heard, Dempsey Henderson, Henry Hixon, Thomas S. Reese, Willie Summers, Robert L. Walker, Louis Weems, Individually and on Behalf of All Others Similarly Situated."

Terminal Transport Company, Inc.

United States of America (Department of Justice).

Equal Employment Opportunity Commission.

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TERMINAL TRANSPORT COMPANY, INC.

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UNITED STATES OF AMERICA and EQUAL
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Respondents.

Petition for a Writ of Certiorari To The United State Court of Appeals for the Eleventh Circuit

The Petitioners, a local labor union in Atlanta, Georgia,[2] and the International Union with which it is affiliated[3] respectfully pray that a writ of certiorari issue to review the judgment of the

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[2] Truck Drivers and Helpers Local Union 728 of Atlanta, Georgia, hereinafter referred to as "Local 728".

[3] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as "International".

United States Court of Appeals for the Fifth Circuit[4] entered in the above case on August 21, 1981; rehearing denied on September 18, 1981.[5]

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at ____ F2d ____. It is reproduced in the Appendix hereto (App. p. A-ff). The opinion of the District Court for the Northern District of Georgia rendered March 6, 1980, is reported at 486 F.Supp. 1195, and is reproduced in the Appendix hereto (App. p. A-14ff).[6]

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[4] The judgment was entered by Unit B of the Fifth Circuit. Since entry of judgment, Unit B of the Fifth Circuit has become the Eleventh Circuit. Thus, this Petition for a Writ of Certiorari is directed to the United States Court of Appeals for the Eleventh Circuit.

[5] Order denying rehearing. Appendix, pp. 12-13.

[6] Other pertinent orders of the District Court are unreported, but are reproduced in the Appendix hereto, as follows:

(A) *Consent Decree,* entered August 4, 1975, on consent of Plaintiffs and Defendant employer, Terminal Transport Company, Inc., to which Petitioner unions were not party. Appendix, pp. 30 to 52.

(B) *Memorandum Opinion and Order of January 21, 1976,* entering judgment for Plaintiffs. Appendix, pp. 53 to 65.

(C) *Memorandum Opinion and Order of June 28, 1976,* establishing procedure for determination of back pay claims against Defendant unions. Appendix, pp. 66 to 72.

(D) *Order of December 30, 1977,* amending all prior orders, and vacating all previous findings of liability of Defendants International and Local 728. Appendix, pp. 73 to 75.

(E) *Agreed Order of June 27, 1978,* specifying individual seniority. Appendix, pp. 76 to 78.

(F) *Order of June 30, 1978,* regarding reference to Master. Appendix, p. 79.

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1981. Rehearing was denied on September 18, 1981. This petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Sections 703(a) through (j), 706(f) through (k) and 707(a), (c) and (d) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§2000e-2(a) through (j); 5(f) through (k), and 6(a), (c) and (d) are reproduced in the Appendix hereto, pp. 91 to 99.

STATEMENT OF THE CASE

Government and private Plaintiffs' allegations of unlawful employment practices by an employer (Terminal Transport) and two unions (Local 728 and International) were made in separate Title VII actions. The suits were consolidated on findings that "the two actions are essentially similar, differing principally in scope, the *Allen* [private] suit being restricted to Terminal's locations in Georgia, and the Government suit being concerned with the entire Terminal system."[1]

(G) *Order of March 15, 1979,* taxing unions for one half of the Master's fee. Appendix, p. 80.

(H) *Order of April 20, 1979,* awarding seniority to named individuals and denying seniority to others. Appendix, pp. 81 to 86.

(I) *Final Judgment,* April 28, 1980. Appendix, pp. 87 to 90.

[1] August 4, 1975, "Decree", p. 2, App. p. 30.

The claims were that Terminal had engaged in a pattern or practice of racial discrimination in recruitment, hiring, assignment, transfer and promotion. The only claims against the unions were that the unions' collective bargaining agreement perpetuated Terminal's racial discrimination.

A "consent decree" to which the unions were not party was entered between private plaintiffs, Government and Terminal, and was approved by the District Court. It required Terminal to pay $200,000.00 in back pay plus $9,000.00 attorney's fees to private attorneys, and required specified modifications of Terminal's employment practices, plus preferential employment to named minority individuals.

The claims for back pay against the unions, and determination of individual seniority standings were left for trial. Upon trial, the District Court held that all Blacks, as a class, were entitled to seniority relief, and were entitled to back pay from the unions.[8]

By subsequent Order of December 30, 1977 (App. pp. 73 to 75), the District Court amended "all prior orders in these suits, including those incorporating findings of fact and conclusions of law", and specified: ". . . previous findings of liability of the unions are vacated . . . However, the unions remain proper parties to these actions under Rule 19(a), Fed.R.Civ.P., in order to provide complete relief."[9]

Although the Plaintiffs "lost . . . their claims for back pay and retroactive seniority against the unions",[10] the unions were ordered to remain in the case as parties to *bona fide* seniority agreements, but only as Rule 19 defendants as per the Supreme Court's direction in *Teamsters* v. *United States*.[11]

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[8] See Order of January 21, 1976, App., p. 53 ff. The amounts of back pay were to be ascertained in future proceedings before a yet to be appointed Master.

[9] December 30, 1977, Order, ¶1.B., p. 2, (App., p. 73).

[10] 486 F.Supp. 1195 at 1200, App., pp. 23-26. In a subsequent order, the District Court reiterated: "The major issues on which the plaintiffs ultimately lost were their claims for back-pay and retroactive seniority . . . against the unions."

[11] 431 U.S. 324, 356, footnote 43, (1977).

The hundreds of "class" seniority claims originally asserted by Plaintiffs were thus diminished to forty-three individual claims for enhanced seniority. Consultations between counsel resulted in agreement to most of the claims and the Court ordered the individual seniority to which there was agreement. There was disagreement as to only four of the individual claims of the private plaintiffs.[12] These were submitted to a Special Master[13] who ruled against three of these claimants and granted enhanced seniority to one. The District Court affirmed the Master, including the award of enhanced seniority to one Georgia claimant.[14]

The attorney for the private plaintiffs thereupon sought and was awarded over fifty thousand dollars in attorney's fees and expenses. 486 F.Supp. 1195, at 1199ff.

The District Court's rationale for the award is displayed in the opinion reported at 486 F.Supp. 1195, 1203. In sum, it recites the above facts, holds the Plaintiffs to be "prevailing"

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[12] Plaintiffs (private and Government jointly) presented claims for enhanced seniority for 46 employees. As required by the Court's Order of December 30, 1977, Terminal, International and Local 728 submitted separate responses. Most of the claims were resolved by agreement in a two-day Court-ordered conference. The questions remaining were the seniority standings of thirteen named persons, only four of whom were Georgia claimants and thus in the *Allen* suit. See Order of April 20, 1979, App., pp. 81-86.

[13] Along with nine Government claims for individuals employed elsewhere in the Terminal system, See April 20, 1979, order at App., pp. 81-86.

[14] Order of April 20, 1979. This Order also required enhanced seniority to eight individuals elsewhere in the Terminal system where claims were made by the Government, not by private plaintiffs. This Order also allowed the complainants whose seniority had been enhanced either by agreement or by the approved findings of the Master, to utilize that seniority in competition with the laid-off employees who had contractual right to recall. App., pp. 81-86.

since "most of the claimed fees relate to the trial which vindicated the plaintiffs' rights".[15] This conclusion is in the face of the fact that the order which resulted from the trial "vindicated" Plaintiffs by granting their class-wide seniority claims and holding unions liable for back-pay was set aside *in toto* by the Court's subsequent order.[16]

Despite the fact that Plaintiffs "prevailed" only against the employer, Terminal, the District Court held, 486 F.Supp. at 1202; App., p. 26ff:

> "A fair allocation of these fees requires that Terminal pay two-thirds, and the unions the remaining third. Compare, *Moten* v. *Bricklayers, Masons and Plasterers,* 177 U.S.App.D.C. 77, 93, 543 F.2d 224, 240 (D.C.Cir. 1976). The issue of union liability for attorney's fees is difficult in part because it is likely, though by no means sure, that had the unions not been party, Terminal would have raised many of the issues it left to the unions. Thus, if it is error to hold the unions for part of these fees, Terminal should be liable for the entire award. However, Terminal was often cooperative, and had the unions not been so steadfast in their opposition this controversy might have ended sooner.
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[15] The Court also notes that "most of the issues not determined by this consent decree were settled through negotiations among the parties, and even before the Special Master the private plaintiffs prevailed on such issues as the burden of proof and the reemployment rights of former employees." 486 F.Supp. at 1200, App., p. 21.

[16] The Court continues the justification of the fee award, finding that Terminal's unlawful racial practices were terminated, thus making Plaintiffs "prevailing", although ". . . the major issues on which the plaintiffs lost were those claims for back pay and retroactive seniority against the union", 486 F.Supp. at 1200, App., p. 23.

> "The unions are correct in pointing out that in *Teamsters* the Court interpreted the Civil Rights Act to evidence a congressional intent that unions be immune from damages arising from *bona fide* seniority systems. Hence, the unions have committed no actionable wrong here, . . . However, fees are not being taxed against the unions because the seniority system perpetuated discrimination, albeit innocently, rather they participated substantially in opposing the legitimate demands of the plaintiff class, so the unions should share the costs to the class."

The opposition[17] to "the legitimate demands of the plaintiff class" is not defined. Actually, the Defendant unions throughout the litigation urged individual "rightful place" seniority for the victims of Terminal's racial discrimination.[18] The union took the identical position in *Teamsters* v. *U.S.*, 431 U.S. 324 (1977), Cf. p. 347 at footnotes 29, 30, and was vindicated, 431 U.S. at 355, 356. The courts below nevertheless characterized the unions' position as "self serving" and concluded that the unions "determined to protect [their] interests by assuming for themselves an active role . . . they participated fully in negotiations over the extent of the retroactive seniority for individual class members and at hearings before the special master", and "played an active part" in the proceeding to determine attorney's fees", ____ F.2d ____ at 10418, App., p. 6.

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[17] The "steadfast" opposition on the part of the unions was an effort to avoid being mulcted for back pay which the unions did not owe, and in protection of a *bona fide* collective bargaining contract and the seniority system there provided.

[18] The Defendant unions' position is summarized in the opinion of the Court of Appeals at footnote 8, ____ F.2d ____ at ____ (1981), App. p. 5.

These activities by Rule 19(a) defendants who had prevailed on every allegation against them,[19] were sufficient in the view of the courts below to result in "a fair allocation of fees", Terminal to pay two-thirds, and the unions to pay the remaining third of the more than fifty thousand dollars which the Court awarded.

The Court also affirmed the taxation of one-half of the Master's fee against the unions, and denied unions any costs against the Government.

In sum, the courts below have relieved the guilty employer (against whom the Plaintiffs did prevail) of one-third of the Plaintiffs' attorney's fees and one-half of the expenses of the Master — and have taxed those substantial amounts against the innocent labor defendants for their "steadfast opposition" to Plaintiffs' attempts to obtain injunction and damages against them.

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[19] Plaintiffs' attorney testified at the fee hearing, pp. 59-60:

"Q. Is it true, Mr. Trister, that the claim which you made on behalf of the Georgia plaintiffs against the union was that it proposed and effectuated a seniority system which, in your view, perpetuated the unlawful racial discrimination which Terminal had practiced?

"A. During the early stages of the case prior to the *Teamsters* decision, I think that is a fair characterization of what we were alleging.

"Q. Were you alleging any more than that with respect to the Unions, if so what?

"A. No, we were not.

"Q. Well, you did not prevail on that allegation; did you?

"A. That's correct, as a result of the Teamsters.

"Q. Now did you make any additional allegations after the *Teamsters* decision in the U.S. Supreme Court?

"A. We did not."

One does not have to read between the lines of the lower court opinions to conclude that those courts believed the original order rewriting the union's seniority contracts and imposing liability for hundreds of thousands of dollars of back pay upon the unions was the desirable result.[20] The Court's reluctance in vacating the order imposing liability on the unions is apparent in the Court's recital that: "This order was vacated only after the Supreme Court decided *Teamsters,* 431 U.S. 324." See 486 F.Supp. at 1201-2, App., p. 25. And "all" Plaintiffs' counsel's efforts are characterized as "necessary and warranted in light of the law at that time", *Ibid* at 1201, headnote 5. Obviously, these recitals were thought to justify the lower Court's notion of what should be a "fair allocation" of fees.

The statute, however, does not speak in terms of "fair allocation". The statute only permits a reasonable attorney's fee to the prevailing party. And Plaintiffs did not prevail against the unions.

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[20] See 486 F.Supp. 1195 at 1201: "The defendants are responsible for the situation which developed into this action, and in fairness to the plaintiff class and their counsel, the defendants must bear the burden of this litigation." App., p. 23.

ARGUMENT

Reasons for Granting the Writ

In the last decade there has been a virtual explosion in federal attorney's fees litigation. Both §706(k) of Title VII and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, allow the prevailing party to recover attorney's fees. Literally hundreds of cases apply these statutes.[21] A series of cases here has given definition and content to the statutory term "prevailing party". *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), teaches that a plaintiff must truly "prevail" before the statute permits him to require his adversary to pay his attorney's fees. There plaintiffs, whose appeal had resulted in reversal of

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[21] See for example, E. Richard Larson, *Federal Court Awards of Attorney's Fees*, Law & Business, Inc., Harcourt, Brace, Jonovich, N.Y., 1981, which "provides a case-by-case summary of nearly 500 of the major court decisions on court-awarded attorney's fees . . ." The "Author's Note", *Ibid*, p. V, asserts: "The significance of the Fees Act and of the litigation thereunder is, quite simply, overwhelming. So too is the incredible growth of the new body of law known as 'federal court award of attorney's fees'. It is the purpose of this book to make this new body of law understandable to all practicing attorneys". See also: Newberg, *Public Interest Practice and Fee Awards*, Practicing Law Institute, N.Y. City, 1980, particularly at pp. 1-11, which discusses "the fee generating opportunities and other rewards for the trial bar in public interest law." And Chapter 5, especially at pp. 282-305, which concerns "Developing the Employment Discrimination Practice — Basic Considerations — Source of Clients — Financing the Litigation until 'Pay Day' Comes and Comments on Fees and Fee Petitions".

A bi-monthly "Federal Attorney Fee Awards Reporter" is now in its sixth issue, published by Law & Business, Inc., Harcourt, Brace, Jonovich, N.Y. 10017, summarizing important fee cases, digesting others, and purporting to note all federal attorney fee awards.

See also the article in the Current American Bar Association Journal: Cruz, "Abuse of Rights in Title VII Cases: The Emerging Doctrine", headnoted, "Courts must weigh some critical factors in determining merits and attorney's fees in Title VII cases", 67 ABA Jrnl 1472 (1981).

adverse directed verdicts, reversal of District Court's discovery orders, and directions to the District Court on remand to impose discovery sanctions, were held not to be "prevailing" parties within the statutory meaning. To "prevail" in the statutory sense requires prevailing on the merits. See also *Roadway Express* v. *Piper,* 447 U.S. 752 (1980). Cf. *Christianburg Garment Co.* v. *EEOC,* 434 U.S. 412 (1978).[22]

Christianburg is at pains to specify:

> "That §706(k) allows fee awards only to *prevailing* private plaintiffs should assure that this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success." 434 U.S. 412 at 422 [emphasis the Supreme Court's]

And *Roadway* explains that "the fee provision of the civil rights laws are acutely sensitive to the merits of an action and to anti-discrimination policy . . . and restrict recovery to prevailing parties" (447 U.S. 752 at 762), and emphasizes that these fee statutes "distinguish between winners and losers". *Ibid* at 762.[23]

Yet the courts below, in requiring the prevailing labor union defendants to pay a portion of their losing adversaries' attorneys' fees and Master's costs, apply a "fairness" test unauthorized by the statute.

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[22] See also *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968). Cf. *Hughes* v. *Rowe,* ___ U.S. ___ (1980) 66 L.Ed.2d 163; *Maher* v. *Gagne,* 448 U.S. 122 (1980).

[23] Other courts of appeals have construed the attorney's fees section of Titles II and VII of the Civil Rights Act of 1964 and §402 of the Voting Rights Amendments of 1975 to permit the award of counsel fees only to a party who has prevailed on the merits of a claim. See footnote 4 to *Hanrahan,* 446 U.S. 754 at 758, citing *Bly* v. *McLeod,* 605 F.2d 134, 137 (CA4 1979); *Chinese, etc.* v. *Lequennec,* 580 F.2d 1006, 1009 (CA9 1978); *Grubbs* v. *Butz,* 548 F.2d 973, 975 (CA DC 1976); *Sperling* v. *United States,* 515 F.2d 465, 485 (CA3 1975).

The lower courts' proper concern that attorney's fees be adequate to assure civil rights plaintiffs competent and effective representation is not warrant for taxing the winner with the loser's attorney's fee.

Nor does the result below advance civil rights policy. The culprit who violated the Act was the employer, Terminal. Yet the employer, the law violator, was relieved of the payment of one third of plaintiff's fees and expenses (approximately twenty thousand dollars), and the employees (both Black and White — through their union) who had done nothing wrong, and were correct in the law, were required to bear that financial loss.

The present opinion takes no account of the Rule 19 character of the unions' involvement in the case. After they prevailed in 1977 on all allegations made against them, the unions' Rule 19 function was to aid the district court in slotting victims of the employer's racial discrimination into their individual "rightful places" in the *bona fide* seniority system.

Presumably the Court ordered the unions' Rule 19 status because, as administrators of the seniority system, the unions had knowledge and expertise as to how the lawful seniority system operated. They performed that function, in the main agreeing with Plaintiffs as to the individual seniority allocations sought by Plaintiffs. They should not be penalized for performing that function. For the rights of both racial victims and innocent incumbents are important. Cf. *Teamsters* v. *U.S.*, 431 U.S. 324 (1977) at 371ff,[24] *Franks* v. *Bowman*, 424 U.S. 747 (1976), opinion of the Chief Justice at 780-781, and Mr. Justice Powell at 790ff.

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[24] As this Court wrote in *Teamsters*, 431 U.S. 324, 371, 372, the District Court's task in making "a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices," . . . "will not be a simple one." Accordingly, "to recreate the conditions and

If penalty is to be imposed on a law-abiding union for performing a Rule 19 function, it is likely to result in a myriad of pending Title VII cases: (1) in lack of union enthusiasm for the Rule 19(a) role of aiding the court to a just result by which workers are treated in color-blind fashion; and more unfortunately, (2) in employer-avoidance of a large part of the statutory duty to reimburse those who have "prevailed" against the guilty employer.

Christianburg holds "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law" 434 U.S. at 418.

In the instant case the "violator of federal law" was the employer, against whom the Plaintiffs did prevail. That "violator" should have been required, according to the statute, to pay the over fifty thousand dollars the district court awarded as attorney's fees and expenses. The lower court's contrary result, by which the guilty employer avoids twenty thousand dollars of that result, shifts the burden to the innocent unions.

This departure from the statutory scheme substitutes the very broad notion of "fairness" which this Court would not permit in *Hanrahan, supra,* 446 U.S. 754.

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relationships that would have been had there been no unlawful discrimination" (*Ibid,* at 372) and "to determine the consequent extent of necessary relief" (*Ibid,* at 376), the district court sought the aid of the unions by ordering them — though innocent of wrongdoing — to remain in the case in Rule 19 status, to assist in slotting racial victims in rightful place in the *bona fide* seniority system. There is no warrant to penalize the unions for performing that function.

CONCLUSION

Accordingly, a writ of certiorari should issue to review the judgment insofar as it requires Defendant unions to pay Plaintiff's attorney's fees and expenses, and the Master's fee, and denies Defendant unions their costs from the Government.

Respectfully submitted,

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Appendix

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APPENDIX
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ITEM 1

UNITED STATES of America, Equal Employment Opportunity Commission and Willie Beasley, Plaintiffs-Appellees,

v.

TERMINAL TRANSPORT CO., INC., Defendant,

and

International Brotherhood of Teamsters, Chauffeurs, etc., Defendants-Appellants.

John T. ALLEN et al., Plaintiffs,

John T. Allen and Willie Beasley, Plaintiffs-Appellees,

v.

TERMINAL TRANSPORT CO., INC., Defendants,

and

International Brotherhood of Teamsters, Chauffeurs, etc., Defendants-Appellants.

No. 80-7386.

United States Court of Appeals, Fifth Circuit. Unit B

Aug. 21, 1981.

Appeal from the United States District Court for the Northern District of Georgia.

Before MILLER,* Judge, and FRANK M. JOHNSON, Jr. and THOMAS A. CLARK, Circuit Judges.

MILLER, Judge:

This is an appeal by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 728 ("unions") from that part of the final judgment of the district court directing that the unions pay $2,256, representing one-half the fees and expenses of a special master, and $16,767.05, representing one-third of the district court's award of attorneys' fees to John T. Allen, et al. ("Private Plaintiffs"); also, denying the unions' claim for costs and attorneys' fees against plaintiffs.[1] The underlying consolidated actions by Private Plaintiffs and the United States[2] ("government") were brought against Terminal Transport Company, Inc. ("Terminal"), and the unions[3] under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and 42 U.S.C. § 1981.

BACKGROUND

The Private Plaintiffs' suit was filed in 1972 by eleven present and past employees of Terminal as a class action. They alleged that Terminal and the unions had discriminated against blacks at Terminal's Georgia facilities on the basis of race in hiring, assignment, promotion, and seniority. Shortly thereafter, the

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* Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

[1] The opinion of the district court is reported at 486 F.Supp. 1195 (1980).

[2] The Equal Employment Opportunity Commisison ("EEOC") was subsequently added as a party plaintiff.

[3] The goverment's action did not name any Teamster locals as defendants but did name the International Association of Machinists, which filed an agreement with the court to not defend the suit and to abide by all orders of the court.

government filed its suit under section 707 of Title VII (42 U.S.C. § 2000e-6)[4] alleging that the defendants had engaged in a pattern and practice of racial discrimination at Terminal's facilities nationwide.

On August 4, 1975, Terminal, the government, and Private Plaintiffs entered into a "Consent Decree in Partial Resolution of Suit," approved by the court. The unions were not parties to this agreement. Under the agreement, Terminal was to provide back pay of $200,000 and preferential job opportunities to one hundred and forty-five persons (another twenty-three persons were subsequently added in 1977) and was to modify its employment practices. Private Plaintiffs were awarded $9,000 for attorneys' fees and costs for negotiating the settlement.

The issue of seniority relief for black employees and applicants for employment was reserved for an evidentiary hearing before the court. At the hearing, the unions sought to show that neither they nor Terminal were in violation; Terminal offered no evidence on the issue. On January 21, 1976, the court held that both Terminal and the unions had violated Title VII and that black employees and applicants for employment were en-

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[4] In pertinent part, section 707 provides:

> (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States
> • • •
>
> • • •
>
> (c) Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the [Equal Employment Opportunity] Commission ....

titled to seniority relief and back pay from the unions.[5] In December of 1977, the court modified its previous order to comply with *Teamsters* v. *United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), decided earlier that year, and held that, in view of *Teamsters,* seniority could not be made retroactive to before the effective date of Title VII and that the unions had not violated Title VII (because their seniority plan was *bona fide*) and were, therefore, not liable for back pay. The court, nevertheless, retained the unions as Rule 19(a), F.R.Civ.P., parties "in order to provide complete relief."

The principal issue then remaining involved the seniority dates for class members entitled to relief under *Franks* and *Teamsters, supra.* Plaintiffs proposed retroactive seniority dates for forty-six eligible class members, all of which were challenged by the unions. Following negotiations, the parties reached an agreement on thirty-three of these, and the remaining thirteen seniority claims were referred to a special master, along with questions of burden of proof with respect to vacancies and the use of retroactive seniority in bidding against laid-off employees.[6] Plaintiffs prevailed on nine of the thirteen claims and also prevailed, over opposition by the unions, on the questions of burden of proof and priority of seniority.

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[5] The court made no finding with respect to the alleged violations of 42 U.S.C. § 1981. Initially it ordered no seniority relief for applicants for employment, but this order was amended to provide such relief in view of *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), decided two months later, which held that an award of seniority retroactive to the date of the job application is appropriate under section 706(g) of Title VII.

[6] Also referred to the special master were two claims involving termination of employment.

OPINION

Attorneys' fees

[1] The unions' principal argument over the taxation against them of one-third of the attorneys' fees awarded the Private Plaintiffs is that the unions were the "prevailing parties" in the litigation[7] and that the government misstates the issue by saying that "plaintiffs prevailed over the unions' determined opposition by winning substantial rightful place seniority relief." They point to "The Teamsters' Position" set forth in their post-trial brief before the district court, filed November 20, 1975,[8] as evidence that the unions had been urging rightful place within a *bona fide* seniority system throughout the lawsuit" and assert that the unions "prevailed in this position"; whereas, the court *denied* plaintiffs' claim that all class members should be awarded classwide "carryover seniority" and that the unions should pay back pay.

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[7] Indeed, this is the premise on which the unions argue that they should have been awarded costs and attorneys' fees against the plaintiffs.

[8] That position is stated as follows:

> IBT asserts that IBT has not participated in, and is not chargeable with, Terminal's discrimination; ... moreover, both IBT and Local 728 say that the agreements were established pursuant to NLRB determination, are nondiscriminatory, lawful, apply equally to all races, and should not be altered.
>
> This is not to say that IBT seeks to block any actions necessary to remedy Terminal's violations.
>
> Specifically, Teamsters from the inception of this litigation have agreed and now reiterate that minority employees of Terminal who have been denied employment as over-the-road employees on the basis of race should be permitted to fill future over-the-road vacancies on a terminal basis with job bidding and lay-off seniority within the over-the-road bargaining unit from the date of such discrimination against them.

However, the self-serving "Position" of the unions is neither an accurate nor a complete picture of events running through the hearing before the special master in December of 1978. As found by the district court, 486 F.Supp. at 1202-03:

> While the thrust of this suit [following the consent decree of August 4, 1975] was against Terminal, and even though after the decision in *Teamsters* it appeared that no relief would be ordered against them, the unions apparently felt they had a real and significant interest in the outcome of the cases. They determined to protect this interest by assuming for themselves an active role. Hence, in the negotiations following entry of the consent decree the unions often carried the laboring oar, in some cases to the exclusion of Terminal. They participated fully in negotiations over the extent of the retroative seniority for individual class members, and at hearings before the special master. Even in the proceedings to determine attorneys' fees they played an active part, often raising issues not mentioned by Terminal and briefing matters that have no bearing on the unions' liability for fees, such as the fee provision of the consent decree.

Both IBT and Local 728 do oppose any award of fictional seniority to minority employees solely on the basis of race, absent a showing that such individual employees have individually been discriminatorily denied road employment.

Teamsters say that upon a finding that Terminal has discriminated on account of race, any individuals damaged by the discrimination should be placed in the "rightful place" each would have occupied but for Terminal's discrimination....

This, however, cannot be ascertained until it is shown: (1) that Terminal discriminated in hiring on account of race, (2) that specific individuals were damaged thereby and (3)(a) that each specific individual opted for a job which Terminal denied him; (b) that he was then qualified to hold such job; and (c) that there was a vacancy which was denied him....

> A fair allocation of these fees requires that terminal pay two-thirds, and the unions the remaining third.... The issue of union liability for attorney's fees is difficult in part because it is likely, though by no means sure, that had the unions not been party, Terminal would have raised many of the issues it left to the unions. Thus, if it is error to hold the unions for part of these fees, Terminal should be liable for the entire award. However, Terminal was often cooperative, and had the unions not been so steadfast in their opposition this controversy might have ended sooner.
>
> However, fees are not being taxed against the unions because the seniority system perpetuated discrimination, albeit innocently; rather they participated substantially in opposing the legitimate demands of the plaintiff class, so the unions should share the costs to the class. [Footnotes omitted.]

As to the "prevailing party" issue, the district court found, 486 F.Supp. at 1200:

> The plaintiffs succeeded in achieving most of the remedies they sought, in the sense that Terminal eventually did what the plaintiffs asked, but there were some individual claims that were not entirely successful, and some requested relief was denied, in particular injunctive relief against the unions for compensatory seniority predating the enactment of Title VII. Unfortunately, in the context of this case it is impossible to allocate the attorney's efforts to the various successful and unsuccessful claims....
>
> Statutory provisions for attorneys' fees provide for the award to the prevailing parties, and do not limit it to compensation for the specific claims won by such parties. There is no contention that the issues on which the defendants were eventually successful were frivolously raised by the plaintiff class. The major issues on which the plaintiffs ultimately lost were their claims for back pay and retroac-

> tive seniority [to prior to enactment of Title VII of the Civil Rights Act of 1964] against the union, which were finally determined by the Supreme Court's decision in [*Teamsters, supra*]' [Footnote omitted.]

Based on the record before us, the findings of the district court cannot be said to be clearly erroneous; nor can the further findings of the court, citing *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), that the efforts of Private Plaintiffs' attorneys were necessary and warranted in light of the law at the time; that said attorneys would have been remiss in their duties had they not pressed all of the allegation; that the skill of said attorneys was in no small part responsible for success in negotiations and at trial; and that the defendants were responsible for the situation that developed into the action, and in fairness to the plaintiff class and their counsel, the defendants must bear the burden of the litigation.[10] We are satisfied that the court correctly determined that the unions, as Rule 19(a) parties, were liable for a fair share of the attorneys' fees in view of the nature and extent of their litigation and negotiation efforts, particularly where these efforts were identified with Terminal's interests. It follows that the unions' claim for costs and attorneys' fees against the plaintiffs must fail. *See Christiansburg* v. *Garment Co.* v. **EEOC**, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

' The unions would appear to equate the Supreme Court's decision in the unrelated case of *Teamsters, supra,* with what they term their "successful effect to block plaintiffs' raid on the union treasury through baseless claims of union backpay liability."

[10] We are persuaded that the district court, citing *Northcross* v. *Board of Education of the Memphis City Schools,* 611 F.2d 624, 636 (6th Cir. 1979), reasonably concluded that "where, as here, it is impossible to allocate time among successful and unsuccessful claims and the plaintiffs have prevailed in the greater part of their case, time spent in good faith on the preparation and pursuit of unsuccessful claims should not be excluded in computing the fee award." 486 F.Supp. at 1201.

[2] As they did before the district court, the unions argue that no attorneys' fees should be awarded the Private Plaintiffs because, due to the goverment's action (filed after and consolidated with the private action), there was no necessity for the private action. The district court found this argument to be "without merit," stating that it was "satisfied that counsel for the private plaintiffs made every effort to avoid duplicating the work of the government, and thus the presence of the government saves the defendants a great deal of money."[11] [Footnote omitted.] 486 F.Supp. at 1201. It said, and we agree, that plaintiffs' counsel "were under a duty, especially great in a class action, to represent thoroughly the interests of their clients" and that the pendency of similar civil rights actions "does not prevent an attorneys' fee award to successful plaintiffs," citing *Nadeau* v. *Helgemoe,* 581 F.2d 275, 281 (1st Cir. 1978), and *United States* v. *Georgia Power Co.,* 474 F.2d 906, 927 (5th Cir. 1973). Indeed, the union tacitly agrees in saying:

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[11] In a footnote, the court referred to itemized expenses of Private Parties' counsel (covering copying, long distance phone calls, travel, express mail, and messenger service) and said it was "impressed with the plaintiffs' counsels' sincere efforts to limit these expenses." It said that the request of the plaintiff class for attorneys' fees and expenses ($50,301.14) "is a conservative one, refreshingly so, and, all things considered, the court finds it eminently fair." The court further said:

> [M]ost of the issues not determined in the consent decree were settled through negotiations among the parties ....
>
> This litigation began only after Terminal had engaged in discriminatory employment practices. The plaintiffs are entitled to recover attorneys' fees for ending the discrimination, and thus they may recover for the work that caused Terminal to settle several issues.... The court finds as a fact, and it has never been open to serious question, that Terminal would not have discontinued its practices except for the effective pressure of private plaintiffs' counsel.

There is ample evidence in the record supporting the above findings, which reflect a reasonable balancing of the relevant factors set forth in *Johnson* v. *Georgia Highway Express, Inc., supra.*

> For the statute allows discretion in awarding attorneys fees to prevailing parties "*other than the [EEO] Commission and the United States.*" § 706(k) [Civil Rights Act of 1964, 42 U.S.C. § 2000e-5k], 42 U.S.C. § 1988.

Moreover, it is recognized that individual employees *may* be permitted to intervene where the government has brought a prior pattern or practice action under section 707. *United States* v. *City of Jackson,* 519 F.2d 1147, 1151 (5th Cir. 1975). And individual employees have the right to intervene in actions brought by the EEOC under section 706. Accordingly, we are persuaded that, if Congress had intended that Private Plaintiffs' attorneys' fees not be permitted when private and government actions are consolidated, it would have specifically so provided—just as it did in section 706(k) with respect to attorneys' fees of the EEOC and the United States.

Costs of special master

[3] In opposing the district court's taxation of one-half the special master's fees and expenses to them, the unions make the point that only one of the four Georgia class members with seniority claims won before the special master. However, the district court correctly found that the Private Plaintiffs "prevailed on such issues as the burden of proof and the reemployment rights of former employees." Moreover, of the fifteen claimants before the special master, he awarded relief to nine (including the one Georgia class member) and denied relief to six (including the other three Georgia claimants).[12] That plaintiffs were not successful on all claims does not defeat their status as prevailing parties or the taxation of cost of the special master to Terminal and the unions. *Carpa* v. *Ward Foods,* 567 F.2d 1316, 1323-24 (5th Cir. 1978). *See also Jones* v. *Diamond,* 594 F.2d 997, 1028 (5th Cir. 1979).

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[12] As earlier related, thirteen of the fifteen claims had to do with retroactive seniority and the other two claims involved termination of employment.

[4] In view of the foregoing, we hold that the district court did not abuse its discretion in its award of attorneys' fees and costs of the special master against the unions and in its denial of the unions' claim for costs and attorneys' fees against the plaintiffs.[13]

The case is REMANDED for a determination of additional costs and attorneys' fees attributable to this appeal to be awarded Private Plaintiffs-appellees. The judgment of the district court is otherwise AFFIRMED.

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[13] Even when a plaintiff fails to prevail in any respect, as was not the case here, the district court may decline to award costs to the defendants. *Delta Airlines, Inc.* v. *August,* ___ U.S. ___, ___ — ___, 101 S.Ct. 1146, 1150-51, 67 L.Ed.2d 287 (1981).

ITEM 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7386

UNITED STATES of America, Equal Employment Opportunity Commission and Willie Beasley,
Plaintiffs-Appellees,

v.

TERMINAL TRANSPORT CO., INC., Defendant,

and

International Brotherhood of Teamsters, Chauffeurs, etc.,
Defendants-Appellants.

John T. ALLEN et al., Plaintiffs,

John T. Allen and Willie Beasley,
Plaintiffs-Appellees,

v.

TERMINAL TRANSPORT CO., INC.,
Defendants,

and

International Brotherhood of Teamsters, Chauffeurs, etc.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING

(September 18, 1981)

Before MILLER,* Judge, FRANK M. JOHNSON, JR. and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Frank Johnson Jr.
United States Circuit Judge

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* Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

ITEM 3

John T. ALLEN et al.

v.

TERMINAL TRANSPORT CO., INC.
et al.

UNITED STATES of America

v.

TERMINAL TRANSPORT CO., INC.
et al.

Civ. A. Nos. 16687, 16761.

United States District Court,
N. D. Georgia,
Atlanta Division.

March 6, 1980.

Plaintiffs in civil rights employment discrimination case applied for attorney fees. The District Court, Henderson, Circuit Judge, sitting by designation, held that: (1) where it was impossible to allocate attorneys' time among successful and unsuccessful claims in the case and plaintiffs prevailed in greater part of their case, time spent by attorneys in good faith in preparation and pursuit of unsuccessful claims should not be excluded in computing the fee award, and (2) unions which participated substantially in opposing legitimate demands of plaintiff class in the case should share attorney fees and expenses upon decision in favor of class against employer and fair allocation required that employer pay two-thirds of fees and union the remaining third.

Order accordingly.

Michael B. Trister, Thomas P. Carney, Jr., Justice Dept., Washington, D.C., for plaintiff.

Robert Beynart, Atlanta, Ga., for Terminal Transport.

HENDERSON, Circuit Judge, sitting by designation.

ORDER

Presently pending in the above-styled case is the application of the private plaintiffs for attorneys' fees. To clarify the issues involved, a hearing on this matter was held on December 3, 1979.

In 1972, this class action was brought, on behalf of the Georgia applicants for employment and employees of Terminal Transport Company (hereinafter referred to as "Terminal"), against Terminal and two union defendants, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the Truck Drivers and Helpers Local Union No. 728. (The International and the Local are sometimes collectively referred to as "the unions.") The complaint alleged Terminal discriminated against black employees and applicants, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq.*, and section 1 of the Civil Rights Act of 1866, 42 U.S.C.A. § 1981. The action was consolidated, by order of the court, with a similar suit filed shortly afterwards by the United States on behalf of Terminal employees nationwide.

While pre-trial proceedings continued, the private plaintiffs, the government and Terminal negotiated and arrived at a settlement, designated as a Consent Decree in Partial Resolution of Suit, which was signed by the court on August 4, 1975. The union defendants did not participate in this settlement. Terminal agreed to pay $200,000.00 to various class members as back pay, to offer preferential employment opportunities to the class members, to hire blacks and whites in equal numbers for each of its facilities, and to modify other employment practices

that had stood as obstacles to equal employment of blacks. The consent decree expressly reserved the issue of employee seniority for subsequent determination. The decree provided that "Terminal shall pay counsel for the named Plaintiffs in [the private class action] $9,000.00 as counsel fees and reimbursement of costs and expenses."

In August, 1975, a trial was held to decide the seniority issue. In January, 1976, the court found that Terminal had discriminated on the basis of race in the employment and assignment of drivers at its Atlanta Cartersville facility, in violation of Title VII and § 1981, and ruled that class members who were incumbent employees were entitled to compensatory seniority. The court originally refused to award seniority to those class members whom Terminal had refused to hire, but, following the Supreme Court's decision in *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), rejected applicants were awarded compensatory seniority on June 28, 1976.

After these orders issued, the parties began negotiations to determine the appropriate seniority relief for individual employees and applicants. Over the course of several years, the parties were able to reach agreement as to most employees, and the unresolved claims, together with other issues, were subsequently referred to a special master. The court adopted the special master's report and recommendations, with certain exceptions, on April 20, 1979.

Pursuant to the consent decree, several named plaintiffs and class members accepted employment as road drivers. Terminal treated these individuals as probationary employees for a period of thirty days, however, which had the effect of denying them the right to exercise their seniority in obtaining desirable job assignments. The plaintiffs brought this to the attention of the court, which directed the parties to try to resolve the question among themselves. After informal negotiations failed the ques-

tions were submitted to an employer-union grievance committee, which made a determination favorable to the plaintiffs on one issue only. The plaintiffs then brought the matter back to the court, and at a hearing held on June 1, 1979, Terminal agreed to provide most of the relief requested. Subsequently, the court held for the plaintiffs on the single remaining issue.

[1] A threshold question is whether the August 4, 1975, consent decree operates to relieve Terminal of any liability for attorneys' fees.[1] The consent decree was discussed at the fee hearing, but the parties were unable to add anything beyond the terms of the agreement. The consent decree expressly stated that "[a]ll questons relating to seniority are reserved for future adjudication by this Court," and further that "Terminal expressly reserves the right to contest the granting of retroactive or preferential seniority to any class member." Consent Decree ¶ 33. In view of the language of the order and the substantial questions it reserved for later resolution, the court agrees with the plaintiffs that "it would be unreasonable to construe paragraph 36 as barring fees for later proceedings in the case," Private Plaintiffs' Memorandum in Support of Application for Attorney's Fees of July 17, 1979, at 6. Thus, although they may not recover for work respecting matters finally settled in the consent decree the plaintiffs are entitled to compensation for attorneys' fees for work on the August, 1975 trial. The plaintiffs have assured the court that any time claimed for the period 1972 through 1975 relates to this trial and not to matters covered by the consent decree. Private Plaintiffs' Reply Memorandum of September 5, 1979, at 2-3; Private Plaintiffs' Supplemental Memorandum of October 22, 1979, Trister Affidavit, at 4 ¶ 5.

[2] The parties agree that the determination of reasonable attorneys' fees, which the private plaintiffs are entitled to recover under both section 706(k) of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-5(k), and 42 U.S.C.A. § 1988 (1979 Supp.), should be guided by the standards articulated in *Johnson* v.

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[1] The union defendants were not parties to the consent decree, and, therefore, it is irrelevant to their obligation to pay fees.

Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). *Johnson* recognizes that the award of attorneys' fees is to a great extent a matter of judgment, and that there is no way to lend "mathematical precision" to what is essentially a balancing process. 488 F.2d at 720. The request of the plaintiff class is a conservative one, refreshingly so, and, all things considered, the court finds it eminently fair. The parties have not discussed the point, but the fee in this case was contingent in the most extreme sense of the word. Plaintiffs' counsel will recover no more than that awarded by this court, and had it been requested this consideration would have justified a serious notion of some augmentation of the award. *Foster* v. *Boise-Casecade, Inc.*, 577 F.2d 335, 336 (5th Cir. 1978) (Judge Vance dissenting in part); *Johnson*, 488 F.2d at 718 ¶ 6. The plaintiffs will be satisfied if they receive approximately what they have requested, so no multiplier has been applied, but this certainly means there is great latitude through which the award cannot be criticised by the defendants. This point having been emphasized, there follows a somewhat detailed analysis of some of the matters considered in computing the award. This discussion is also intended to show that those issues stressed by the defendants do not justify reduction of the award, but even if this were otherwise, the conservative amount requested, and granted, would still be appropriate.[2]

[3] A proper first step under *Johnson* is to multiply the hours of work performed by a reasonable hourly rate,[3] to arrive at a

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[2] The difficult questions involved in the present determination, abundance of briefs and the tenacity with which the defendants maintain their position are only typical of this litigation.

[3] Terminal complains that the use of a single rate is inappropriate and that the court should use one rate for time spent in court, another for trial preparation and yet another for the remaining compensable time. The court finds, however, that the rates proposed by plaintiffs' counsel are reasonable, whether viewed as weighted rates or otherwise.

base from which to work. The private plaintiffs have provided the data to perform this computation in their application of July 17, 1979, as supplemented by their memorandum of October 22, 1979. After reviewing the underlying facts, the court accepts as true and reasonable the following:

Compensable Time and Reasonable Rates

Michael Trister		
1972-75	226 hours @ $60.00 =	$13,560.00
Michael Trister		
1976-77	170 hours @ $75.00 =	$12,750.00
1978-79	200 hous @ $90.00 =	18,000.00
Thelma Wyatt Cummings		
1972-75	29.5 hours @ $60.00 =	$1,770.00
1976-77	11.5 hours @ $75.00 =	862.50
Expenses[4]		$3,358.64
		$50,301.14

The award thus computed should be adjusted to reflect the several factors enumerated in *Johnson*. A consideration of the

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[4] These expenses are itemized in Exhibit 4 of the Private Plaintiffs' Supplemental Memorandum of October 22, 1979. The court is impressed with the plaintiffs' counsels' sincere efforts to limit these expenses. Such endeavors are not surprising, however, because when the expenditures were made counsel had no assurance that they would be compensated.

Johnson factors indicates that this award is extremely conservative.[1]

Some of the *Johnson* criteria require only brief comment. The court is satisfied that the plaintiffs' counsel went to great lengths to avoid duplicating the work of the government lawyers who were also involved in this case; a related issue is developed more fully below. While they cannot be described as novel, the issues involved in this case were difficult, and counsel was required to deal with a constantly changing law, especially in the areas of union liability and seniority. Plaintiffs' counsel brought great skill to bear on their tasks, and this skill was in no small part responsible for their success in negotiations and at trial. Both lawyers for the plaintiffs have extensive experience in civil rights cases, as their reputations reflect. Michael Trister may be said to have specialized in civil rights cases. Finally, counsel secured substantial non-pecuniary relief for the class and its individual members.

[4] When this suit was brought, Trister was on the staff of the Wasington Research Project, a public-interest law firm in Washington, D.C. He went into private practice in 1976, but continued to work on the case, for which the Research Project reimbursed his firm, covering his out-of-pocket expenses and paying for his time at the rate of $30.00 per hour. At the attorneys' fees hearing Trister informed the court that all fees allocable to him would go to the Wasington Research Project, and that he was "not getting a penny." The union defendants, in their brief of January 14, 1980, urge that since the Washington Research Project is not "a prevailing party" the court cannot award it fees. They argue that in any case fees

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[1] As stated, the court does not feel it is necessary to award more than the plaintiffs request, even though a greater sum might be justified. The courts "do not have a mandate under Section 706(k) to make prevailing counsel rich." *Johnson*, 488 F.2d at 719. Granting substantially all they request should be enought to attract competent counsel "and to fairly place the economical burden of Title VII litigation," *Id.*

should not be calculated on a basis of more than $30.00 per hour (the rate at which Trister was paid by the Washington Research Project) or greater than his salary during the period he worked for that organization. These contentions are without merit—it is settled that attorney's fees may be awarded for representation provided by public-interest firms, and that such awards are not limited to the amount the lawyers are paid by those organizations. *Harkless* v. *Sweeny Independent School District*, 608 F.2d 594 (5th Cir. 1979); *Northcross* v. *Board of Education of the Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1244-50 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978); *EEOC* v. *Enterprise Association Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976), *cert. denied*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977); *Tillman* v. *Wheaten-Haven Recreation Association*, 517 F.2d 1141, 1148 (4th Cir. 1975); *Thompson* v. *Madison County Board of Education*, 496 F.2d 682 (5th Cir. 1974); *Fairley* v. *Patterson*, 493 F.2d 598, 606 (5th Cir. 1974); *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534, 538-39 (5th Cir. 1970).

Much of the dispute over reasonable attorneys' fees for this case has centered on the question of whether the private plaintiffs were "prevailing parties" in the sense that term is used in the statutes authorizing attorney's fee awards, 42 U.S.C.A. § 2000e-5(k); 42 U.S.C.A. § 1988 (1979 Supp.). As an initial matter, the defendants, especially the local union, maintain the private plaintiffs did not "prevail," since only one of the four Georgia class members with seniority claims won before the special master. However, most of the claimed fees relate to the trial, which vindicated the plaintiffs' rights. Moreover, most of the issues not determined in the consent decree were settled through negotiations among the parties, and even before the special master the private plaintiffs prevailed on such issues as the burden of proof and the reemployment rights of former employees.

[5] This litigation began only after Terminal had engaged in discriminatory employment practices. The plaintiffs are entitled to recover attorneys' fees for ending the discrimination, and thus they may recover for the work that caused Terminal to settle several issues. *Iranian Students Association* v. *Edwards*, 604 F.2d 352 (5th Cir. 1979); *Dawson* v. *Pastrick*, 600 F.2d 70, 78 (7th Cir. 1979); *Bonnes* v. *Long*, 599 F.2d 1316, 1318 (4th Cir. 1979); *Ross* v. *Horn*, 598 F.2d 1312, 1322 (3rd Cir. 1979); *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-81 (1st Cir. 1978); *Foster* v. *Boorstin*, 182 U.S.App.D.C. 342, 345, 561 F.2d 340, 343 (D.C.Cir.1977); *Brown* v. *Culpepper*, 559 F.2d 274, 277 (5th Cir. 1977); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970). The court finds as a fact, and it has never been open to serious question, that Terminal would not have discontinued its practices except for the effective pressure of private plaintiffs' counsel.

The plaintiffs succeeded in achieving most of the remedies they sought, in the sense that Terminal eventually did what the plaintiffs asked, but there were some individual claims that were not entirely successful, and some requested relief was denied, in particular injunctive relief against the unions for compensatory seniority predating the enactment of Title VII. Unfortunately, in the context of this case it is impossible to allocate the attorney's efforts to the various successful and unsuccessful claims. The plaintiffs generously suggest that their request might be reduced by up to ten percent to reflect the fact that their claims for back pay against the unions were unsuccessful and their failure to achieve the full seniority they sought for a small number of class members. Private Plaintiffs' Supplemental Memorandum of October 22, 1979, at 4 n. *. Such an adjustment is unnecessary.[6]

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[6] Again, since the plaintiffs have not requested that their award be multiplied by a contingency factor, the determination is, within a wide range, a fair one.

Statutory provisions for attorneys' fees provide for the award to the prevailing parties, and do not limit it to compensation for the specific claims won by such parties. There is no contention that the issues on which the defendants were eventually successful were frivolously raised by the plaintiff class.[7] The major issues on which the plaintiffs ultimately lost were their claims for back pay and retroactive seniority against the union, which were finally determined by the Supreme Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

Once again, *Johnson* provides guidance on how to deal with the question of fees for issues unsuccessfully pursued by plaintiffs who are successful in the litigation taken as a whole. "The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a consent with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation. Adequate compensation is necessary, however, to enable an attorney to serve his client effectively and to preserve the integrity and independence of the profession." *Johnson*, 488 F.2d at 719-20. All of the efforts of plaintiffs' attorneys were necessary and warranted in light of the law at that time. Indeed, as they note, plaintiffs' counsel would have been remiss in their duties as representatives of the class had they not pressed all these allegations. The defendants are responsible for the situation that developed into this action, and in fairness to the plaintiff class and their counsel, the defendants must bear the burden of this litigation.

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[7] Consequently, the unions' request that the plaintiffs be taxed for the unions' attorneys' fees is groundless. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 419, 423, 98 S.Ct. 694, 699, 701, 54 L.Ed.2d 648, 655-58 (1978). Nor is it appropriate to allow the unions to recover their costs from the plaintiffs in this case.

[6] While the results obtained must be considered, *Johnson*, 488 F.2d at 718 ¶ 8, fee-paying clients do not receive a discount when their attorneys are unsuccessful on relatively minor aspects of the litigation. Especially where, as here, it is impossible to allocate time among successful and unsuccessful claims and the plaintiffs have prevailed in the greater part of their case, time spent in good faith on the preparation and pursuit of unsuccessful claims should not be excluded in computing the fee award. *But cf. Nadeau* v. *Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978) (fee should only reflect work on successful issues, at least where they do not "dominate" litigation). As the Sixth Circuit has held,

> The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute [42 U.S.C.A. § 1988] comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter," . . . So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation . . .. There are numerous practical reasons why a court may not be permitted to dissect a law suit into "issues and parts of issues as to which the plaintiffs did not prevail," . . .

Northcross v. *Board of Education of the Memphis City Schools*, 611 F.2d 624 at 636 (6th Cir. 1979).

[7] The United States brought its pattern-or-practice suit soon after the private plaintiffs filed theirs. The defendants now insist that no attorneys' fees should be awarded to the private plaintiffs, since their work necessarily duplicated that performed by the government. This argument, once again, is without merit. The court is satisfied that counsel for the private plaintiffs made every effort to avoid duplicating the work of the government,[4] and thus the presence of the government saves the

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[4] See note 4, *supra*.

defendants a great deal of money. Even if there had been duplication, the court would be reluctant to allow Terminal to benefit from the fact that not only private plaintiffs, but also the government brought suit. In any case, the plaintiffs were the first to initiate suit, and once they did so their counsel were under a duty, especially great in a class action, to represent thoroughly the interests of their clients. The pendency of similar civil rights actions should not and does not prevent an attorneys' fee award to successful plaintiffs. *Nadeau* v. *Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978); *United States* v. *Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973) (private Title VII actions consolidated with action brought by United States).

Next, it is necessary to determine who should pay the award of $50,301.14 in attorneys' fees and expenses. Specifically, the court must decide whether the unions are liable for a portion of the award.

One of the plaintiff class' major contentions was that the unions' seniority system perpetuated the results of Terminal's discrimination by protecting the seniority rights of drivers who had been employed while Terminal was still discriminating against black applicants. At one point the court held the unions were liable for the effects of the seniority system, and awarded job-category seniority retroactive to the date of employment. This order was vacated only after the Supreme Court decided *Teamsters*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). In *Teamsters*, the Court held that in passing Title VII, Congress had immunized unions from damages resulting from a bona fide seniority system, and that seniority awards could only date from the passage of the 1964 Civil Rights Act. Accordingly, in December, 1977, the court vacated its prior orders to the extent that they set seniority dates prior to the date of passage of the Civil Rights Act or allowed members of the plaintiff class to recover back pay from the unions. It was then necessary to ad-

just the seniority dates of several class members, and the unions remained parties to the action in order that complete relief might be provided. Fed.R.Civ.P. 19(a); *see also Teamsters,* 431 U.S. at 357 n. 43, 97 S.Ct. at 1865 n. 43, 52 L.Ed.2d at 428 n. 43. Of course, the court did make seniority retroactive to the effective date of the Civil Rights Act or employment subsequent thereto. *Franks* v. *Bowman Transportation Co., Inc.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976).

While the thrust of this suit was against Terminal, and even though after the decision in *Teamsters* it appeared that no relief would be ordered against them, the unions apparently felt they had a real and significant interest in the outcome of the cases. They determined to protect this interest by assuming for themselves an active role. Hence, in the negotiations following entry of the consent decree the unions often carried the laboring oar, in some cases to the exclusion of Terminal. They participated fully in negotiations over the extent of the retroactive seniority for individual class members, and at hearings before the special master.[9] Even in the proceedings to determine attorneys' fees they played an active part, often raising issues not mentioned by Terminal and briefing matters that have no bearing on the unions' liability for fees, such as the fee provision of the consent decree.

[8] A fair allocation of these fees requires that Terminal pay two-thirds, and the unions the remaining third.[10] *Compare, Moten* v. *Bricklayers, Masons and Plasterers.* 177 U.S.App.D.C. 77, 93, 543 F.2d 224, 240 (D.C.Cir.1976). The issue of union

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[9] For a summary of the post-settlement activities of the unions and Terminal, see Private Plaintiffs' Supplemental Memorandum of October 22, 1979, at 3-4; Government Plaintiffs' Memorandum of July 16, 1979, at 2 n. 2.

liability for attorneys' fees is difficult in part because it is likely, though by no means sure, that had the unions not been party, Terminal would have raised many of the issues it left to the unions. Thus, if it is error to hold the unions for part of these fees, Terminal should be liable for the entire award. However, Terminal was often cooperative, and had the unions not been so steadfast in their opposition this controversy might have ended sooner.

The unions point out that in both *Teamsters,* and *United States* v. *East Texas Motor Freight Systems, Inc.,* 564 F.2d 179, 183 (5th Cir. 1977), there is language to the effect that there can be no monetary award against unions in Title VII cases. However, these two cases, *East Texas Motor Freight* following *Teamsters,* merely held that back pay could not be awarded against a union, and it is clear that attorneys' fees are a different question. *Cf. Hutto* v. *Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) (attorneys' fees could be awarded against the state, even though damages could not). The unions are correct in pointing out that in *Teamsters* the Court interpreted the Civil Rights Act to evidence a congressional intent that unions be immune from damages arising from bona fide seniority systems. Hence, the unions have committed no actionable wrong here, and *Hutto* is distinguishable, since in that case it was clear that Arkansas had unlawfully operated its penitentiaries, but was simply immune from an award of damages therefor. However, fees are not being taxed against the unions because the seniority system perpetuated discrimination, albeit innocently; rather they participated substantially in opposing the legitimate demands of the plaintiff class, so the unions should share the costs to the class.

Two cases from other circuits support the proposition that attorneys' fees in a Title VII case may be assessed against those who, while innocent of any illegal discrimination, erected substantial obstacles that the plaintiffs had to overcome in

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[10] Both the unions and Terminal have opposed the grant of any award, but no party has suggested a proper allocation of liability for an award granted against all defendants.

resisting such discrimination. In *Moten* v. *Bricklayers, Masons and Plasterers, supra,* 177 U.S. App.D.C. 77, 92, 543 F.2d 224, 239 (D.C.Cir.1976), the court awarded fees against a contractors' association that had not been a party to the Title VII suit brought by a class of employees against the unions that refused to represent them. The unions assert that *Moten* is distinguishable because the association had not been an original party in the action. However, the *Moten* court awarded damages despite this fact, and the distinction found by the unions cuts against them here: "But the Association purported to become a party appellant when it filed its appeal, and the plaintiffs were compelled to defend against its efforts in order to maintain their hard-won settlement agreement. This is not a situation in which the court is being asked to enter an award against a person which has in no way entered its name upon the court records." *Id.* 177 U.S.App.D.C. at 92, 543 F.2d at 239.[11]

Similarly, in *Haycraft* v. *Hollenbach,* 606 F.2d 128 (6th Cir. 1979), the court held that under the 1972 Emergency School Aid Act, 20 U.S.C.A. § 1617, attorneys' fees could be awarded against a county judge who intervened in a school desegregation case to offer a desegregation plan eventually rejected by the district court. "That [the judge] was not a principle defendant in the litigation, although a factor to be considered by the court, is not determinative of the propriety of an assessment of attorneys' fees against him. The alternative desegregation plan proposed by [the county judge] imposed a substantial barrier to the realization of the full constitutional rights of" the plaintiffs. At 132. Notwithstanding the present arguments of the unions to

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[11] The opinion in *Moten* also observed that it is difficult to allocate liability for the fees in a case such as this, and while noting that any allocation is subject to appellate review, the court held that liability was not limited to the incremental costs occasioned by the activities of the association (or, by analogy, the unions). 177 U.S.App.D.C. at 93, 543 F.2d at 240.

the contrary, the actions of the labor defendants compelled the plaintiff class to defend its settlement and intensify its efforts for further relief.

As a final matter, the United States suggests that it would be premature to dissolve the consent decree. Terminal does not oppose, and, in any case, the position of the government is well taken, and the decree will remain in effect.

ITEM 4

CONSENT DECREE
IN PARTIAL RESOLUTION OF SUIT
(August 4, 1975)

These actions commenced as separate actions. Civil Action No. 16687, *John T. Allen, et al.* v. *Terminal Transport Company, et al.*, was filed June 2, 1972, as a Class Action under Rule 23, F.R.C.P., and alleged that the various defendants thereto were engaged in racial discrimination in employment in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1981. Civil Action No. 16761, *United States of America* v. *Terminal Transport Company, Inc., et al.*, was filed June 21, 1972, and alleged that the various defendants thereto were engaged in a pattern and practice of racial discrimination in employment in violation of Title VII of the Civil Rights Act of 1964 and Executive Order 11246. The two actions are essentially similar, differing principally in scope, the *Allen* suit being restricted to Terminal's locations in Georgia and the *United States* suit being concerned with the entire Terminal system. The parties have agreed to a consolidation of their causes for purposes of entry and implementation of this decree.

Terminal and the respective defendant unions answered, denying the allegations of the respective suits, and denying any violations of the Civil Rights Act of 1964, 42 U.S.C. 1981, or of Executive Order 11246. Nevertheless, Terminal, in order to avoid burdensome litigation, has agreed with the plaintiffs in the two respective cases to the entry of this joint Consent Decree. This Decree, being issued with the consent of Terminal and Plaintiffs, shall not constitute an adjudication or finding on the merits of the case and shall in no manner be construed as an admission by Terminal of any violation of said Title VII or Executive Order 11246 or 42 U.S.C. Section 1981, or an admission by plaintiffs that the job qualifications contained herein are warranted by business necessity.

DECREE

IT IS HEREBY ORDERED AND ADJUDGED:

General Provisions

1. Terminal and its officers, agents, employees, successors, and all persons in active concert or participation with them are permanently enjoined from engaging in any act or practice which has the purpose or effect of discriminating against any individual because of his race or color. For purposes of this paragraph the term "agents" does not include independently owned cartage companies with whom Terminal contracts.

2. Terminal shall designate one corporate official or employee at each of its terminals and at its general office who shall be responsible for compliance with this Decree. Terminal shall also designate one corporate official who shall have overall responsibility for Terminal's compliance with this Decree. Terminal shall give Plaintiffs the names of said officials or employees within 30 days of the date of this Decree.

3. The Affected Class under this Decree includes all Black employees of Terminal Transport, present and past, and all Black applicants for employment by Terminal Transport who were refused employment by Terminal Transport, insofar as they were affected by any act of racial discrimination occurring since July 2, 1965, to the date of entry of this Decree. The Affected Class does not include owner/operators, fleet owners or their employees.

Qualifications for Employment

The following shall be the requirements for employment in the job classifications described:

4. **Road Drivers**

(a) No less than one (1) year's experience operating tractor-trailer equipment.

(b) A reasonable amount of the applicant's driving experience as required in (a) above shall be under driving conditions comparable to those of the position for which he is applying, and operating kinds of equipment comparable to that to be operated in the position for which he is applying.

(c) A reasonable amount of the applicants driving experience as required in (a) above shall be on the public streets and highways.

(d) Military driving experience and/or graduation from an accredited truck driving school approved by Terminal shall be considered towards fulfiling the requirements set out above, to the extent that such military experience is the equivalent of civilian experience as defined in (a), (b) and (c) above.

(e) Possession of a valid and appropriate commercial driving license.

(f) Passage of Terminal's physical examination administered by a Terminal-approved doctor.

(g) Meets the requirements set forth in DOT Motor Carrier's Safety Regulations.

5. **City Drivers**

(a) Applicant must demonstrate his ability to handle safely equipment comparable to that to be operated in the position for which he is applying.

(b) Possession of a valid and appropriate commercial driving license.

(c) Passage of Terminal physical examination administered by a Terminal-approved doctor.

(d) Meets the requirements set forth in DOT Motor Carrier's Safety Regulations.

6. **Dock**

(a) Passage of a Terminal physical examination administered by a Terminal-approved doctor.

(b) Ability to read and write sufficiently to understand and complete freight bills, written handling instructions, etc., as required by his job.

(c) Must be at least 21 years old.

(d) Meets the requirements set forth in DOT Motor Carrier's Safety Regulations.

7. **Mechanics**

(a) Must be a journeyman mechanic as defined by the custom of the trade.

(b) Must be able to read and write sufficiently to understand written maintenance and repair instructions and to complete those forms incidential to his employment.

(c) Meets the requirements set forth in DOT Motor Carrier's Safety Regulations.

8. **Clerical**

(a) Passage of objective, practical tests which measure the skills and aptitudes required for the job sought, i.e., typing, shorthand, and office machine tests.

(b) Applicants for sales positions shall be given consideration for employment based upon their sales experience not only in the trucking industry but in other freight transportation-related fields.

9. **All Positions**

(a) Terminal may require any applicant to take the DOT written and practical tests applicable to the job position sought, to know and understand the DOT Motor Carrier's Safety Regula-

tions applicable to the job position sought, to pass a Terminal physical examination administered by a Terminal-approved doctor, to complete such forms as are reasonably required by Terminal in its hiring procedure, and to read and write sufficiently to perform the duties of the job position sought.

(b) Terminal may require any applicant for any position to have a police record free of any felony conviction(s) in the past five (5) years involving larceny, robbery, burglary, theft, or any other form of crime involving the misappropriation of property belonging to others, providing that at the time of his application the applicant shall have been released from imprisonment for such crime for a period of one year or more; Terminal may require any applicant for any position to have a police record free of any misdemeanor conviction(s) in the past one (1) year involving larceny, robbery, burglary, theft, or any other form of crime involving the misappropriation of property belonging to others, providing that at the time of his application the applicant shall have been released from imprisonment for such crime for a period of six (6) months or more.

(c) Applicants for job classifications not described in paragraphs 4 through 8 above shall be required to meet the qualifications of paragraphs 9(a) and 9(b) above only.

(d) In the event that Terminal, as the result of a temporary labor shortage, must hire an applicant unqualified under the foregoing standards, Terminal may do so, but that applicant may be hired on a temporary basis only and for a period of time not to exceed 7 days, and may not be considered for further employment, on a casual basis or otherwise, until qualified under such standards.

(e) In selecting from among multiple qualified applicants for a specific job opening, Terminal, in a manner consistent with the hiring goals and attainment levels set forth in this Decree, may consider such factors as education, driving record, experience, and past work record.

Recruiting

10. Within 60 days of the entry of this Decree, Terminal shall undertake an employee recruiting program aimed at the black community in each city where Terminal maintains a terminal, by:

(a) The notification of persons and organizations in each such city representing the black community in such city or representing a potential source of qualified black applicants, which persons and organizations are to be identified by plaintiffs within 30 days of the date of entry of this Decree. Within 30 days of the receipt of the list of such persons and organizations, Terminal shall write said persons and shall inform said organizations that it desires to hire qualified black employees and shall further advise said organizations of the vacancies then available and shall provide further a resume of job qualifications required for those positions, as outlined in paragraph 4 through 9, and shall advise such organizations of the applicable hiring date at the Terminal, such contacts to be repeated as necessary to meet the hiring goals set forth in this Decree, but in no event less than annually. The form of the notice described herein will be agreed upon by the parties.

(b) In the event that the recruitment methods provided for in paragraph 10(a) above do not generate a sufficient number of qualified applicants for job opportunities, Terminal shall, to the extent necessary to meet the hiring goals provided for in paragraph 24, commence a program of the placing of advertisements in black oriented newspapers and on black-oriented radio stations, to the extent available, announcing Terminal's policy of affording equal employment opportunity to blacks and advising of any job classifications available, such advertising to be conducted on a reasonable frequency.

Terminal's basic obligation with respect to recruiting is to provide qualified black applicants in sufficient numbers to meet the hiring goals set forth in paragraph 24.

11. In recruiting for its management and supervisory positions (to the extent that Terminal does not promote from within) Terminal shall afford equal opportunity to all regardless of race. When engaged in college recruiting, to the extent that Terminal does engage in college recruiting, Terminal shall, to the extent feasible, include colleges having large black enrollments among the colleges visited.

Hiring Procedures:

12. Each terminal shall conspicuously post a notice stating the days and hours during which that terminal accepts applications for employment.

13. Terminal shall accept "pre-employment questionnaires" from all applicants who inquire about employment regardless of whether job vacancies exist. Said "pre-employment questionnaires" shall be substantially equivalent to the form set out as Exhibit "A" to this Decree. Said questionnaires will be completed by the job applicant. No applicant will be disqualified from employment because information is missing from the questionnaire until said applicant is first notified of the missing information and given an opportunity to complete the questionnaire. All applications and pre-employment questionnaires shall state on their face that they are to be retained by the Company only ninety (90) days and must be renewed thereafter.

14. In the event that there are vacancies in the job classification indicated on the applicant's questionnaire, Terminal will provide the applicant with an "employment application", which will be substantially in the form set out in Exhibit "B" to this Decree and which will be filled out by the applicant in his own handwriting at Terminal. No applicant will be disqualified because information is mising from the application, until he is first notified of the missing information and given an opportunity to complete the application.

15. In the event an applicant has been declined for employment, Terminal shall advise the applicant within seven (7) working days of the reason he was declined for employment, excepting those situations in which the applicant has been declined as the result of an adverse recommendation by a former employer, or a confidential communication by any third person contacted by Terminal with respect to that person's application. In any event, Terminal will record in writing upon the application form the reason(s) for which the applicant was declined. In the event the applicant was declined because a more qualified applicant was hired, the more qualified applicant's name shall be noted.

16. Terminal shall keep under consideration all other pre-employment questionnaires and applications for a period of 90 days from the date of receipt of said documents. In the event a job category opens which cannot be filled from current job seekers, Terminal will consult its 90 day file of previous pre-employment questionnaires and applicants for purposes of contacting qualified job applicants before seeking applicants from the general outside community.

Specific Relief:

17. **General**

The following portion of this Decree is intended to afford relief to those members of the Affected Class who have claims against Terminal. It is not intended to affect the general recruiting and hiring policies of Terminal as set out in this Decree, except to the extent that the class members are to be afforded preference over all non-class members in filling job vacancies. All black persons presently or formerly employed by Terminal as either a mechanic or a mechanic apprentice shall be entitled to the relief provided under this Decree, with the exception of transfer rights out of their collective bargaining unit or the equivalent work grouping in non-union shops, other than to seek a supervisory position in the shop or maintenance department.

18. **Persons entitled to preferential employment:**

For purposes of this Decree, the following persons are entitled to preferential employment:

(a) The following named Plaintiffs in cause No. 16687: John T. Allen, Willie J. Beasley, William Bing, Clarence Butts, Henry P. Hixson, Willie Simmons, and Robert Walker, providing that the person is now qualified under the provisions of paragraphs 4 (except 4(b) and (c)) through 9 above for the position to which he desires transfer, (listed on Appendix A);

(b) All black persons presently employed by Terminal as regular or casual employees who desired transfer from one job classification to another, whether such transfer was requested or not, providing that said persons are now qualified under paragraphs 4 (except 4(b) and (c)) through 9 above. (Current regular employees are listed on Appendix B, and current casual employees are listed on Appendix C).

(c) All black persons formerly employed by Terminal as regular or casual employees, excluding employees who were discharged for cause or who resigned their employment under such circumstances that absent such resignation they would have been discharged for cause (in which latter event Terminal shall have the burden of demonstrating to the claimant, plaintiff, or the Court that the resignation was secured under such circumstances and that the person is not entitled to relief), who desired transfer from one job classification to another, whether such transfer was requested or not, and who resigned their employment as a result of racial discrimination, providing that said persons are now qualified under paragraphs 4 (except 4(b) and (c)) through 9 above. (Former regular employees are listed on Appendix D, and former casual employees are listed on Appendix E).

(d) All black applicants listed on Appendix F, providing that said persons, at the time preferential employment is offered

under this Decree, are qualified under paragraphs 4 (except 4(b)) through 9 above, and providing further that:

(1) the applicant makes proof that he applied to Terminal for employment; and

(2) the applicant was qualified for the position applied for under paragraphs 4 (except 4(b)) through 9 above at the time he applied; and

(3) a vacancy existed in the position applied for. A vacancy shall be deemed to have existed if Terminal hired a white employee for regular employment in the position for which the black applied within 90 days following the date of his most recent application.

(c) For purposes of preferential employment under this Decree, any applicant whose name appears on Appendix F, or whose name is added thereto pursuant to Paragraph 35 of this Decree, shall be deemed to have satisfied the requirements of subparagraphs (1), (2), and (3) of subparagraph (d) herein at the time said applicant initially applied to Terminal for employment; however, no presumption shall arise thereby that said applicant is qualified for employment at the time said applicant is offered preferential employment by Terminal pursuant to this Decree.

19. Notice of Preferential Employment

(a) Within 30 days of the date of entry of this Decree, Terminal Transport will mail a notice (the form of which will be agreed upon by the parties signatory to this Decree) to each person whose name and address appears on Appendices A, B, C, D, E and F attached to this Decree, (including any persons added to said Appendices pursuant to paragraph 35(b)) the purpose of which is to advise each person of relief provided in this Decree and further advise them that the issue of seniority relief is yet unresolved. Thereafter, each Affected Class Member set

forth in Appendices A, B, C, D, E and F will be afforded thirty (30) days to indicate in writing an interest in transferring to or applying for the job indicated to the right of that person's name as it appears on either Appendices A, B, C, D, E or F (or, if more than one job is so indicated, to the job which he selects from those listed) with seniority as determined by Order of this Court. Failure of any Affected Class Member of Appendices A, B, C, D, E or F to respond shall be presumed to be a reservation of his prefential hiring rights pending resolution of the seniority issue.

(b) Within 30 days of the date of resolution of the seniority issue, Terminal Transport will mail a notice (the form of which will be agreed upon by the parties signatory to this Decree) to each Affected Class Member of Appendices A, B, C, D, E or F (including any person added to said Appendices pursuant to paragraph 35(b) of this Decree), regardless of whether or not said person responded to the notice described in paragraph 19(a) above, advising each person of whatever seniority relief is provided pursuant to the Court's Order. Thereafter, each Affected Class Member will be afforded thirty (30) days to indicate in writing his final decision to accept transfer or employment as provided for by the Court, or to refuse such transfer or employment. Any Affected Class Member who does not respond in writing as provided for in this subparagraph shall be deemed to have waived his rights to preferential hiring under this decree.

20. **Preferential Hiring Procedure**

Job vacancies to which Responding Class Members (those Affected Class Members affirmatively responding to the notice set forth in subparagraphs 19(a) and (b) above) will be entitled to bid under the terms of this Decree shall be filled by the following procedure for preferential bidding:

(a) Terminal shall advise the Responding Class Members (or a reasonable number thereof in order of seniority or date of hire) by written notice of the job vacancy and shall invite bids on the vacancy.

(b) Responding Class Members desiring to bid shall do so in writing, not later than 10 days after bids are invited; however, those Responding Class Members who are not employed by Terminal Transport at the time of the invitation for bids shall have up to 10 days from receipt of the invitation to respond in writing if they desire to bid.

(c) Responding Class Members shall be allowed to bid for preferential employment in the following sequence:

(1) the named plaintiffs (Appendix A)

(2) current regular employees (Appendix B)

(3) current casual employees (Appendix C)

(4) former regular employees (Appendix D)

(5) former casual employees (Appendix E)

(6) applicants not hired (Appendix F)

(d) Within the classifications listed in subparagraph (c) above, persons shall be ranked by seniority date, (if current or former regular employee), by date of initial hire (if current or former casual), or by date of application (if applicant not hired).

(e) Those persons electing to accept immediate transfer or employment under the provisions of subparagraph 19(a) above shall constitute an initial preferential employment list to be used by Terminal in providing preferential employment pending resolution of the seniority issue by the Court. In the event that this list is exhausted by Terminal, prior to the final resolution of the seniority issue by the Court, then Terminal may hire from the general public, consistent with the hiring goals set forth in this Decree, until such time as the seniority issue is resolved.

(f) Those persons who do not respond affirmatively to the notice in 19(a) above need not be notified of vacancies and shall not be required to bid on vacancies until such time as the seniority issue is resolved.

(g) In implementing the preferential employment provisions of this Decree, Terminal shall fill vacancies at each terminal occurring after entry of this Decree from the preferential employment list to the extent that such persons are available at a given terminal. Thereafter, the company shall fill vacancies in a manner consistent with the hiring goals set forth in paragraphs 24 through 27 of this Decree.

(h) Subsequent refusal of an Affected Class Member who responds affirmatively to the notice described in subparagraph 19(a) above to accept transfer prior to entry of seniority relief in this matter shall not be deemed a waiver of his right to receive notice under paragraph 19(b) above.

(i) Any Affected Class Member who responds affirmatively to the notices described in subparagraph 19(a) or 19(b) above, and who transfers pursuant thereto, shall be permitted to return to his previous position without loss of seniority as vacancies occur provided that he gives notice within 30 days of entry of the seniority relief in this matter of his intent to return.

(j) Only written acceptance of a proposed job vacancy shall constitute a bid; written refusal or failure to indicate acceptance or refusal shall constitute a refusal to bid; however, written refusal or failure to bid shall not be deemed to constitute a refusal in the event the potential job opening is filled through acceptance of a more senior bidder.

(k) The term "vacancy" as used in this Decree for determining preferential employment opportunities to be afforded Affected Class Members shall include all openings deemed by Terminal to require replacement by a new hire or by an increase in Terminal's operations or business where, ordinarily, additional employees would be hired or would be put to work. The rights of members of the Affected Class vis-a-vis laidoff employees shall be as agreed to by the parties or as determined by this Court. Until an agreement is reached or a Court determination

is made, the existing provisions of collective bargaining agreements and practices thereunder with respect to layoff and recall rights of employees will remain in effect.

21. **Probationary Period**

(a) Class members described in Paragraphs 18(a) and 18(b) above shall have a 30 day probationary period in their new job classification, during which time each such person shall have the right to return to his previous job classification, and during which time Terminal shall have the right to return him involuntarily to his previous job classification, providing only that Terminal's action shall be consistent with its actions towards new employees generally in terms of their performance in those job classifications. Employees returning to their former job classifications whether voluntarily or involuntarily, shall retain their job seniority in that job classification as if they had taken a leave of absence during the probationary period in the new job classification. In the event an employee returns to his previous job classification, whether voluntarily or involuntarily, then that employee will have been deemed to have waived any further right to preferential employment under this Decree. During said probationary period Terminal shall have the right to discharge for cause any person, and, so long as said discharge is solely for reasons other than the person's inability to fulfill his job functions, the person shall have no right to return to his former job classification.

(b) A class member described in 18(c) employed by Terminal shall be subject to the same probationary provisions as are applied to any new employee of Terminal. In the event such person is discharged for cause or resigns, then he shall be entitled to no further preferential employment under this Decree.

Financial Compensation to Affected Class Members

22. (a) Terminal agrees to furnish the sum of $200,000.00 in full and final settlement as between the parties of its alleged

obligation to provide back pay, financial contribution toward fringe benefits, or any other financial obligation to or on behalf of the Affected Class Members, to Affected Class Members as that class is described in Paragraph 3 herein.

(b) Of that amount of financial compensation set forth in Paragraph 22(a) above, twenty-one thousand ($21,000.00) dollars is to be set aside as a minimum for distribution to those individuals listed on Appendix A. Of the remaining sum ($179,000.00), one hundred twenty-four thousand ($124,000.00) dollars is to be distributed, to those individuals listed on Appendices B, C, D, E and F and the amount which each person shall be awarded, based on that person's pro-rata share of the total earnings loss of those persons on Appendices B, C, D, E and F, is stated on the respective appendix. The remaining fifty-five thousand ($55,000.00) dollars is set aside for the purpose of satisfying, on the same pro-rata basis, those claims, which may be forthcoming as a result of the Notice provided for in Paragraph 35. For the purpose of assuring an equitable distribution of the one hundred seventy-nine thousand ($179,000.00) dollars to those persons listed on Appendices B, C, D, E and F and those persons who may submit a valid claim pursuant to the above mentioned notice it may in the future be necessary to readjust those amounts of compensation now listed on Appendices B, C, D, E and F, so that each individual's share of the award will be proportional to that individual's share of the total earnings loss.

Upon the resolution of any claims presented pursuant to Paragraph 35, the plaintiffs shall prepare and submit to the Court, for attachment hereto, revised Appendices A, B, C, D, E and F which shall reflect, (1) any additional members of the Affected Class, (2) monetary awards to those added class members, and (3) and adjustment of the compensation initially listed on Appendices A, B, C, D, E and F.

The Company may challenge the propriety of the individual amount designated for any class member to avoid extreme relative inequity or irrational allocation, however, such challenge must be filed with Plaintiffs within thirty (30) days of the entry of this Decree. There will be no fewer than thirty (30) days for discussion between the parties. Unresolved disputes are to be submitted to the Court for resolution. In the event of a dispute over relative amounts of back pay under this paragraph, the Company shall have the burden of proof.

(c) Within thirty (30) days of final agreement between the parties, or pusuant to an Order of the Court in the event of a dispute hereunder, on the designated amount for each class member, Plaintiffs will mail to each Affected Class Member designated to receive financial compensation under this Decree notice of the amount to be tendered him, together with a release as described in Paragraph 23. Thereafter upon presentation by Plaintiffs to Terminal of executed releases, Terminal shall provide Plaintiffs with a group of checks payable to the class members respectively. In the event that an Affected Class Member does not accept the designated portion of said settlement, it shall be divided proportionately among the persons listed on Appendices A, B, C, D, E and F.

23. **Release**

Any person accepting financial compensation under this Decree shall sign a release (the terms of which shall be agreed upon by the parties signatory to this Decree) stating that such compensation is accepted in full and final settlement of all claims for back pay or other type of monetary compensation, against Terminal or any predecessor or successor corporation pertaining to issues which are resolved by this lawsuit based upon any pending litigation or other alleged discriminatory actions because of race occurring prior to the date such release is signed. The signing of such release by an Affected Class Member shall constitute a waiver of any rights as to any back

pay or other type of monetary compensation not otherwise specifically provided for herein against Terminal or any predecessor or successor corporation which may have accrued to the Affected Class Member.

In the event that any Affected Class Member does not sign a release within sixty (60) days of mailing as described in Paragraph 22(c), that class member shall forfeit and forever forego any monetary relief provided pursuant to this Decree.

Hiring Goals:

24. Upon entry of this Decree, and subject to the availability of qualified black applicants, Terminal shall adopt and seek to achieve a goal of 50% black hiring for vacancies in the classifications of road driver, peddle driver, mechanic, switcher (hostler or spotter), checker, office, and clerical at each terminal, except as provided in paragraph 27, over a period of each quarter during the duration of this decree until the number of blacks in the job classification at the terminal is equal to the percentage of Black persons in the working age (eighteen (18) through sixty-four (64)) population of the Standard Metropolitan Statistical Area (SMSA) or city of the terminal location as shown by the 1970 Census, unless Terminal can show that any percentages contained therein are not substantially reflective of the qualified black work force of a given city. For purposes of this Decree, Cartersville, Georgia, shall be considered to be within an SMSA having an 18% black population.

However, at those terminals at which any of the above classifications are combined into a common bid list (e.g., road, city, office or shop) the above hiring goal shall apply to the filling of vacancies on such list as a whole and not to the individual classification contained within such list.

25. The Company shall recruit and hire persons for managerial and supervisory positions without regard to race.

Subject to the availability of qualified applicants, Terminal shall adopt and seek to achieve a goal of hiring blacks for 25% of such positions in such classifications for each quarter until the percentage of blacks in those positions is 10% system wide for six months in a continuous twelve month period.

26. Terminal shall use its best efforts to hire casuals in the same ratio in which it hires regular employees, but casuals shall not be counted in computing the ratio set forth in Paragraph 24 above, and Terminal is under no affirmative obligation to hire casuals in any ratio or to maintain its list of casual personnel in any ratio.

27. For terminals or facilities with 50 total employees or less, Terminal shall not be required to adopt hiring goals for each job classification, but shall be required to adopt and seek to achieve a goal of hiring black persons for 50% of all vacancies in that terminal, until the work force of the terminal reaches the percentage of the black persons in the working age in the relevant hiring area as shown by the 1970 Census, unless Terminal can show that any percentages contained therein are not substantially reflective of the qualified black work force in the area.

Records and Reports

28. *Records* — During the period of this Decree, each terminal shall maintain the records listed below. Such records shall be available to Plaintiffs or their designated representatives for inspection and copying at Plaintiffs' expense upon written request, which requests are not to interfere with the normal operation of Terminal's business.

(a) Copies of all correspondence and documents relative to recruiting as set forth in Paragraph 9 above.

(b) All pre-employment questionnaires and job applications, including those no longer in the current file.

(c) Records showing by name, race, and date all new hires (and the jobs to which they are assigned) promotions, transfers between job classifications, terminations within a probationary period, and dismissals.

Reports — (a) Within thirty days of entry of this Decree, Terminal shall submit to the Court and to Plaintiffs a report showing, by race, and by job classification at each terminal, the number of persons employed as of the date of the entry of this Decree.

(b) Within thirty days after the end of each quarter thereafter, a report containing the same information at the beginning of the quarter, job applicants, new hires, promotions, transfers between job classifications (whether voluntary or involuntary), terminations within a probationary period on the job, dismissals and other terminations and the number of persons employed at the end of the quarter, and further showing the status of all persons entitled to preferential employment pursuant to paragraphs 18 through 21 above, including specific reasons for any termination, dismissal, or involuntary transfer.

(c) Where a job applicant has been denied employment for failure to comply with the requirements set forth in Paragraph 4 of this Decree, the report shall set forth specifically the grounds for such denial.

(d) Where a class member listed on Appendices A through F has been refused employment or transfer as a result of his failure to qualify for the position sought at the time employment or transfer is offered, Terminal shall report such fact to Plaintiffs within seven (7) days of such refusal, stating in detail the reason(s) for such failure.

Miscellaneous:

29. With respect to any alleged violations of this Decree which come to the attention of the Plaintiffs, Plaintiffs shall give Ter-

minal written notice of the alleged violation, and Terminal shall have 45 days after receipt of the written notice to investigate and correct or refute the alleged violation before the Plaintiffs may apply to the Court for an order on account of any such alleged violation.

30. Terminal shall not discriminate or retaliate in any manner as to any employee or applicant who has furnished information or participated in any respect in the investigation of Terminal's employment practices in connection with this action or any other Title VII proceeding.

31. Terminal shall continue to use its road driving test when considering the overall qualifications of road driver and city driver applicants. However, if any member of the Affected Class who can demonstrate that he has met the driving experience requirements set forth in Paragraphs 4 and 5 above, fails such test, the individual shall be entitled to retake the test one time if he so desires, the test to be administered by a Terminal supervisory person of his choice who is qualified to give the test at the respective local terminal.

32. **Transfer Between Terminals**

(a) An Affected Class member may elect to seek employment at a terminal other than the one at which he applied, providing he either applied for employment as, or for a transfer to, an over-the-road driver position at a terminal which does not now have a road driver operation, and providing that his application for or employment at the terminal was prior to the seniority date of the last road driver hired at that terminal. In this event the Affected Class member shall have right to preferential employment under Paragraphs 17 through 21 at that the terminal(s) to which the road driver operation was re-domiciled.

(b) Affected Class Members who applied for employment as an over-the-road driver or requested a transfer to that classification at the Birmingham, Alabama terminal shall have right but

not the obligation to preferential employment under Paragraphs 17 through 21 at either the Birmingham, Alabama terminal or the Cartersville, Georgia terminal provided that they applied for or were employed by Terminal Transport during the time between January 1, 1970 and September 1, 1973.

(c) Affected Class members at Atlanta, Georgia shall have rights for preferential employment under Paragraphs 17 through 21 for over-the-road driver positions at the Cartersville, Georgia terminal.

33. **Seniority**

The parties to this Decree are unable to agree upon the disposition of questions relating to seniority afforded Affected Class Members under the preferential employment provisions of this Decree. All questions relating to seniority are reserved for future adjudication by this Court. The parties to this Decree expressly state that the inclusion on Appendices A, B, C, D, E and F of named class members, and the granting of preferential employment to any of those class members by Terminal, does not constitute an admission by Terminal that any one or all of those class members, or the class as a whole, is entitled to any form of retroactive or preferential seniority in this instance. Terminal expressly reserves the right to contest the granting of retroactive or preferential seniority to any class member in this instance.

34. **Modification**

Any party to his Decree may, for good cause, petition for modificaton of this Decree or any portion thereof.

35. **Class Notice**

(a) Plaintiffs, United States of America and Equal Employment Opportunity Commission, believe that Notice provisions of Rule 23, Federal Rules of Civil Procedure, are inapplicable to

Civil Action No. 16761. Upon entry of this Decree, Notice of their rights to request exclusion from the class under Rule 23, Federal Rules of Civil Procedure, and to petition the Court for modification or recision of the Decree shall be given to all members of the class in Civil Action No. 16687. Terminal shall also give Notice of the provisions of this Decree, as agreed upon by the parties signatory to this Decree, to any other member of the affected class. Such Notice, together with a copy of this Decree, shall be posted in conspicuous locations in each of Terminal's terminals, in each Local hiring hall of Local unions representing employees of Terminal, and to the extent feasible mailed to class members by Terminal Transport. Class members who desire to be excluded from the provisions of this Decree under Rule 23, Federal Rules of Civil Procedure, or who have objection to or wish modification to or recision of the Decree shall state this objection in writing to this Court no later than 60 days after entry. In the event no objections are received as described above, then this Decree shall remain in full force and effect, unless otherwise modified pursuant to paragraph 34 above, and shall have an effective date with respect to financial compensation of 60 days after the entry of this Decree. In the event that objections are received, the effective date of this Decree with respect to financial compensation shall be the date on which such objections are resolved by the Court.

(b) In the event that a person not on Appendices A, B, C, D, E or F presents a claim in response to the class notice described in Paragraph 35(a) above, the question of the addition of such claimant to Appendices B, C, D, E or F will be settled by agreement among the parties. Unresolved disputes are to be submitted to the Court for resolution.

36. Terminal shall pay counsel for the named Plaintiffs in cause Number 16687 $9,000.00 as counsel fees and reimbursement of costs and expenses.

37. Terminal shall post a copy of this Decree, together with a statement of the company's equal employment opportunity policy, on all employee's bulletin boards at each of its terminals.

38. In the event that the parties to this Decree are unable to reach agreement on any issue on which the Decree contemplates agreements by the parties, then in that event any party may petition the Court for an adjudication of the dispute.

Retention of Jurisdiction

39. The Court retains jurisdicton of this action for such further relief or other orders as may be appropriate and for a period of at least four (4) years from the date of entry of this Decree. At the expiration of four (4) years from the date of entry of this Decree, any party may move for dissolution of the Decree, upon a proper showing.

SO ORDERED, this 4 day of August, 1975.

/s/ Albert J. Henderson
Judge,
United States District Court
for the Northern District of
Georgia, Atlanta Division

ITEM 5

ORDER

(January 21, 1976)

These are three civil actions growing out of alleged discriminatory employment practices of the defendants. Civil Action No. 16761 (referred to as the government's case) was commenced by the Attorney General to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.* and the contractual obligations imposed by Executive Order 11246, as amended, 30 F.R. 12319. Civil Action No. 16687 (referred to as the private plaintiffs' case) is a suit brought pursuant to the provisions of Title VII and 42 U.S.C. §1981 by the named plaintiffs on behalf of themselves and others similarly situated. The third suit, Civil Action No. C-74-2045-A, was filed by Erwin Jones and consolidated with the private plaintiffs' case. All three actions came on for trial by the court sitting without a jury. The plaintiff, Jones, and his attorney did not participate in the hearing.

Upon consideration of the evidence in the record, stipulations and the arguments and briefs of counsel, the court makes the following findings of fact and conclusions of law.

The defendant, Terminal Transport Company, Inc. (hereinafter referred to as "Terminal"), is an interstate common motor freight carrier engaged in the shipping and delivery of goods in approximately twelve states, including Georgia. Within Georgia it operates trucking terminals in Atlanta, Cartersville, Macon, Valdosta and Dalton. Terminal employs city and over-the-road drivers (hereinafter referred to as "road" drivers), dockmen, mechanics, office and clerical personnel, supervisors, salesmen, servicemen, partsmen, garagemen, janitors and maids. The defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Teamsters International"), is a labor organization, headquartered in Washington, D.C. and

consisting of over 900 local unions. One such local union is the defendant, Local 728, which represents numerous employees of Terminal who work at its facilities in the State of Georgia.[1]

On August 4, 1975 the court approved a "Consent Decree in Partial Resolution of Suit" to which the government and the private plaintiffs and the defendant, Terminal, were parties. Pursuant to the terms of the consent decree, Terminal agreed to engage in an affirmative hiring program of black persons for certain job categories, to allow qualified black incumbent city and shop employees the opportunity to transfer to road driving positions, to extend offers of employment to those black persons who previously had applied for road jobs and other positions but had been refused and to provide $200,000.00 in lieu of back pay compensation to those injured by the company's prior practices. However, the decree was not signed by any of the union defendants and by its terms did not constitute any finding on the merits of the case and specifically reserved the questions relating to seniority for adjudication by the court.

As of June 30, 1972, Terminal employed approximately 2,792 persons of which 200 were black. Particular job classifications and certain terminals revealed a great disparity between the percentage of blacks and whites, especially in road driver positions which, on the average, pay significantly more than those for city drivers. Although Terminal employed over 500 regular road drivers, only seven were black and of these seven, six were domiciled at Nashville, Tennessee and one at Louisville, Ken-

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[1] Local 728 is a defendant in the private plaintiffs' case but not in the government's action. The International Association of Machinists & Aerospace Workers of America (hereinafter referred to as the "Machinists International") was named as a defendant in Civil Action No. 16761 but entered an agreement with the government filed on October 9, 1973, whereby it stated that it did not intend to file any defensive pleadings and would abide by any order issued in resolution of this litigation.

tucky. The other terminals had never hired a black regular road driver.[2] There were no blacks at any terminals in supervisory[3] or sales positions and very few working as mechanics or office and clerical workers. Most of the black employees of terminal were hired as city drivers, dock workers, servicemen, janitors or maids.[4] Eight terminals had never employed blacks as of June

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[2] The two Georgia road terminals, Atlanta and Cartersville, fall into this latter category of locations which had not employed black road drivers.

[3] The Chicago terminal did have a black dock foreman from August 19, 1968 to February 6, 1969.

[4] The breakdown of statistics by categories and terminals is shown in an attachment to the stipulations, entered into between the plaintiffs and Terminal. Totals are derived as follows;

Job Category	Total White & Black Employees	White Employees	Black Employees
Supervisory	336	336	0
Office/Clerical	282	275	7
Sales	44	44	0
Road Driver	533	526	7
Peddle Driver	51	49	2
City Driver/Dock	1273	1127	146
Mechanic (includes mechanics, leadmen, apprentice & helpers)	176	166	10
Partsmen	13	13	0
Servicemen (includes Servicemen A and B tiremen and fuelmen)	33	19	14
Garagemen	5	4	1
Maintenance	1	1	0
Janitor/Maid	13	0	13

Similar statistics are found in Attachment I to the government's Request for Admissions dated August 28, 1973. The data attached to the stipulations, while considered as any other evidence admitted at trial, is not binding on the defendant unions since they were not signatory parties to that agreement. However, Teamsters International in its response to the Request for Admissions

30, 1972[5] fifteen other terminals failed to have blacks in regular clerical jobs as of June 30, 1972[6] and at least ten terminals had no blacks working as mechanics.[7]

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answered that it "had no knowledge of the facts asserted" in Request No. 66, which concerned the accuracy of Attachment I. Such an answer is insufficient under Rule 36(a), Fed.R.Civ.P. because Teamsters International failed to state, as that rule requires, that it had "made reasonable inquiry and that the information known or readily obtainable by [it] is insufficient to enable [it] to admit or deny." Thus, the matter in Request No. 66, relating to the accuracy of Attachment I is deemed admitted. Rule 36(a), Fed.R.Civ.P. Additionally, the total number of blacks for each job category can also be determined from Plaintiff's Exhibit No. 3.

[5] These terminals are in Chattanooga, Tennessee, Dayton, Ohio, Fostoria, Ohio, Jacksonville Distribution Division, Milwaukee, Wisconsin, Rock Falls, Illinois, Saginaw, Michigan and Venice, Florida. Response No. 17 of Terminal to the government's Request for Admissions. Teamsters International filed a response to the Request for Admissions but failed to answer No. 17. Therefore, the information contained therein is deemed admitted against it under Rule 36(a), Fed.R.Civ.P.

[6] These terminals are: Chicago, Illinois, Cincinnati, Ohio, Dalton, Georgia, Delray Beach, Florida, Detroit, Michigan, Indianapolis, Indiana, Jacksonville, Florida, Louisville, Kentucky, Macon, Georgia, Mansfield, Ohio, Miami, Florida, Nashville, Tennessee, Orlando, Florida, St. Louis, Missouri and Tampa, Florida. Admitted by Terminal in Response No. 29 to government's Request for Admissions. Teamsters International's answer that it has no knowledge of these facts is insufficient for the same reason noted in footnote 4, *supra*. Therefore, Request No. 29 is deemed admitted against it. Also, footnote 4, *supra*, shows seven blacks in the office/clerical category. Of these, five were at the Atlanta General office and one each was listed for Birmingham, Alabama and Columbus, Ohio.

[7] These were Cincinnati, Ohio, Columbus, Ohio, Delray Beach, Florida, Indianapolis, Indiana, Jacksonville, Florida, Miami, Florida, Nashville, Tennessee, Orlando, Florida, St. Louis, Missouri and Tampa, Florida. Admitted by Terminal in Response No. 30 to government's Request for Admissions. Teamsters International's reply of lack of knowledge fails for the same reason given in footnote 4, *supra*. The facts there are deemed admitted against Teamsters International.

Statistical evidence alone may establish a prima facie case of past discrimination. *Rodriguez* v. *East Texas Motor Freight,* 505 F.2d 40 (5th Cir. 1974), and may often be dispositive in a pattern and practice suit. *U.S.* v. *T.I.M.E.-D.C.,* 517 F.2d 299 (5th Cir. 1975). Such is the case here. Terminal discriminated against blacks in the employment of road driver, supervisory personnel, clerical and office workers and mechanics. While testimony of plaintiffs' witnesses demonstrate individual instances of discrimination, it is not necessary to set forth such evidence in detail since the statistical data alone will suffice. As noted in *Sabala* v. *Western Gillette, Inc.,* 516 F.2d 1251, 1261 (5th Cir. 1975), quoting from *United States* v. *Hayes International Corp.,* 456 F.2d 112, 120 (5th Cir. 1972), "The inference [of discrimination] arises from the statistics themselves and no other evidence is required to support the inference."

Once a prima facie case has been proved, the burden falls on the defendants to "rebut the statistics or to explain the disparity in hiring." *Rodriquez* v. *East Texas Motor Freight, supra* at 54. Terminal does not attempt to deny the evidence or to justify the disparity. However, the unions offered other statistics at the trial to refute the charge of discrimination. The testimony of R. V. Gadd, Vice President of Administration at Terminal and Plaintiff's exhibit 41 reveal that between 1967 and 1975 the total number of employees at Terminal increased by 1083. 641 of these were added as a result of the acquisition of another company, leaving 442 hired directly. Of this number, 309 or 70% were black. These totals are not broken down by job categories and do not show that Terminal hired more blacks in the critical classifications of road drivers, supervisors, clerical and office workers and mechanics.

The responsibility for the hiring of employees rests solely with Terminal. The unions, then, cannot be held accountable for discrimination since they did not participate in that process. Their liability relates entirely to their interest in the seniority provisions of the various contracts with Terminal.

Terminal's road drivers, city drivers, checkers, dockmen, office and clerical personnel except supervisors at certain terminals are members of local unions affiliated with the Teamsters International.[8] These employees are covered by collective bargaining contracts which consist of three parts: the National Master Freight Agreement, various area supplemental agreements and local riders. The provisions governing methods and procedures for determining and applying seniority are contained in the area supplements.[9] Generally they have the effect of prohibiting seniority accumulated in one job category carrying over to another classification.

The result of the seniority system included in these contracts is to reinforce the past discrimination of Terminal by inhibiting the movement of minority city drivers into road driver positions. See *Sabala* v. *Western Gillette, Inc., supra.* The defendant unions have not justified the seniority scheme on the ground of business necessity, as they must do to overcome the plaintiffs' initial proof. See *Rodriguez* v. *East Texas Motor Freight, supra.* In fact, here as in *Rodriguez,* the lock-in effect of separate seniority rosters could be eliminated by permitting seniority to be carried over on a one-time-only basis for qualified city drivers who want to transfer to the road. See 505 F.2d at 61. While the company's no-transfer policy[10] also served to perpetuate prior discrimination and is unlawful under Title

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[8] Garagemen and mechanics with certain exceptions also belong to unions associated with either Teamsters International or the Machinists International

[9] In Ohio, there is a local rider which also affects seniority at certain Ohio terminals.

[10] Terminal had a general policy of prohibiting a city driver from transferring to a road position but required that he resign his present job and reapply for employment as an over-the-road driver. Exceptions to this rule existed in Ohio, where Terminal had acquired the operations of another company.

VII, *Bing* v. *Roadway Express, Inc.*, 444 F.2d 687 (5th Cir. 1971), the union's role in maintaining the separate seniority system makes it also answerable for a violation of Title VII. *U.S.* v. *T.I.M.E. D.C., supra; Rodriguez* v. *East Texas Motor Freight, supra.*

Teamsters International, relying on *Herrera* v. *Yellow Freight Systems, Inc.*, 505 F.2d 66 (5th Cir. 1974) and *Resendis* v. *Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974), argues that it has no responsibility for the offending seniority design. In both of these cases, the Fifth Circuit Court of Appeals ruled that there was no violation of Title VII since the separate seniority lists originated at the area conference level. 505 F.2d at 68, n. 2 and at 71, n. 2. But more recently, the same court apparently reasoned otherwise. *U.S.* v. *T.I.M.E.-D.C., supra.* See *Sabala* v. *Western Gillette, Inc., supra.* In *T.I.M.E.-D.C.*, the court of appeals emphasized the major role of the international union in negotiating the contracts embodying seniority rights.

> Of great significance to the determination to proceed in the absence of the Teamster locals is the major role played by the International both in the process of contract negotiation and in all phases of this litigation. Teamster contracts are negotiated every three years on a nationwide, multi-union, multi-employer basis with each individual local giving the National Over-The-Road and City Cartage Policy and Negotiating Committee a power of attorney to negotiate on its behalf.
>
> While the National Master Freight and applicable Area Supplement will be included in the contract which the local eventually signs with the employer, both the national and area contracts are subject to acceptance by a nationwide majority vote of Teamsters, thus the members of an individual local will be bound by its provisions even if the majority of the members of the particular local votes to reject it. The process of negotiation shows that the individual locals play little if any role in the actual negotiation of the

> contracts which control Teamsters' seniority rights and further, that officers of the International are in a position to play a major role in that negotiation. [footnote omitted].

517 F.2d at 310. The court did not attempt to reconcile the result reached there with the conclusions stated in *Herrera* and *Resendis*. However, after *T.I.M.E.-D.C.*, this district takes the position that an international union is liable where the collective bargaining agreements relating to seniority are negotiated under its control, either directly or indirectly. *Freeman* v. *Motor Convoy, Inc.*, Civ. No. 16185, ____ F.2d ____, (N.D. Ga. Dec. 10, 1975). The evidence here shows that all the local unions are required by the international constitution to affiliate with an area conference having jurisdiction over them. These area conferences are jointly funded by the international and the local unions but, as the constitution of the Teamsters International explicitly states in Art. XVI, Sec. 1, p. 101, "[T]hey shall be at all times subject to the unqualified supervision, direction and control of the General President [of Teamsters International] and they shall function under the rules prescribed by the Bylaws approved by the General President." The president, subject to the approval of the executive board, (constitution Art. XVI, Sec. 4, pp. 105-106) has the authority to appoint bargaining committees to negotiate area agreements. One such committee, the National Over-the-Road and City Cartage Policy and Negotiating Committee, was a party to supplemental agreements involved here. Thus, while Teamsters International itself does not sign the area agreements governing seniority, its control over the negotiations sufficiently links it to the discriminatory effects of those seniority provisions.

Local 728 must also bear responsibility for the prohibited impact of the collective bargaining agreements to which it was a signatory. See *Sabala* v. *Western Gillette, Inc., supra; Johnson* v. *Goodyear Tire & Rubber Company*, 491 F.2d 1364 (5th Cir. 1974).

Before fashioning the appropriate remedy, an initial decision must be made as to whether only the named plaintiffs in the private action can recover. During the trial, it was ruled from the bench that the private suit would not be entertained as a class action since the motion to certify the class was not timely filed. Subsequently, the private plaintiffs submitted a supplemental memorandum, contending that their motion cannot be deemed untimely under Rule 221.13, Local Rules of the United States District Court for the Northern District of Georgia, since that provision, requiring the motion for class determination to be made within ninety days after the filing of the complaint, did not become effective until January 1, 1974, three months after the pre-trial conference. This argument is not persuasive. The plaintiffs could have easily submitted a written motion within ninety days after the effective date of the rule. However, in light of the language of *Rodriguez* v. *East Texas Motor Freight, supra* at 50, the court is of the opinion that despite the lateness of the motion, it has an independent obligation to decide the class action issue.

The plaintiffs seek to represent all present and former black employees at Terminal facilities in the State of Georgia and all black applicants at these locations who were denied jobs. In order to maintain this action for such a class, the representatives must first show that the requirements of Rule 23(a), Fed.R.Civ.P. have been met, but these prerequisites should be read liberally where a suit is brought under Title VII and 42 U.S.C. §1981. *Rodriguez* v. *East Texas Motor Freight, supra.*

Here the plaintiffs note that the number of blacks employed by Terminal in Georgia on June 30, 1972 was 75 and at least 23 black applicants are known to have been rejected at these facilities. There may be more who have not yet been identified and, thus, could not be joined now. Therefore, "the class is so numerous that joinder of all members is impracticable." Rule 23(a), Fed.R.Civ.P.

Also, there is no dispute that "there are questions of law or fact common to the class," Rule 23(a)(2), that "the claims . . . of the representative parties are typical of the claims . . . of the class," Rule 23(a)(3), or that "the representative parties will fairly and adequately protect the interests of the class." Rule 23(a)(4). This type of suit is "inherently" a class action. *Rodriguez* v. *East Texas Motor Freight, supra* at 50. In addition to meeting the prerequisites of Rule 23(a), it also appears that 23(b)(2) has been satisfied since "the party opposing the class has acted or refused to act on grounds generally applicable to the class."

Accordingly, the class is certified to include all present and former black employees of terminal in the State of Georgia and all black applicants in this state who were denied employment.

The plaintiffs seek an injunction, back pay and appropriate seniority status. In view of the consent decree, there is no necessity to further enjoin Terminal or require the expenditure of additional sums. Hence, all that is left is the question of seniority carry over and the issues of equitable relief and damages against the unions.

Once discrimination is established, the wrong must be rectified by permitting those persons who are entitled to relief to assume their "rightful place" as job openings develop. *Rodriguez* v. *East Texas Motor Freight, supra; Franks* v. *Bowman Transportation,* 495 F.2d 398 (5th Cir. 1974); *Bing* v. *Roadway Express, Inc.,* 485 F.2d 441 (5th Cir. 1973). The consent decree focuses on this objective to the extent that it specifically sets forth a method of preferential employment for the affected class. The problem remains, though, as to how much seniority the individual will carry over for bidding and lay off purposes after he transfers to a different job category. In *Franks* v. *Bowman Transportation, supra,* the court allowed the aggrieved employees to compete for positions in other departments on the basis of accumulated company seniority, 495 F.2d

at 416-18. But *Bing* v. *Roadway Express, Inc., supra,* favored a "qualification date" formula based on the date the transferees possessed the experience necessary to qualify them for the road driving jobs. 485 F.2d at 451. Whether the *Bing* or *Franks* method is followed depends on whether the company "rigidly adhered to" its experience requirements in hiring. *Rodriguez* v. *East Texas Freight, supra,* at 64, n. 30. If the company does not strictly observe its stated qualifications, full company seniority must be granted. See *id.*

In numerous cases Terminal did not abide by its policy in considering experience as a criteria for road drivers. The company's qualification standards for job categories were for the most part unwritten until the time it answered the government's interrogatories in October of 1972. For road drivers Terminal stated that it required two years of tractor-trailer over-the-road experience but modified that policy to eighteen months in October of 1971. Richard V. Gadd, Vice President of Administration at Terminal, testified that the company employed many road drivers first as casuals without reviewing or approving their records at the general office. Rudolph Pulliam, Vice President of Industrial Relations, stated that prior to 1972 the company did not check the employment background of prospective casual road drivers but that each applicant was hired primarily on the basis of a road test. Furthermore, there are numerous personnel files which did not reflect the requisite prior road experience. Terminal admits in its Response No. 1 to the government's Request for Admissions that fifty-six road drivers were hired without any verification of their past experience of driving tractor-trailors. Teamsters International refused to admit these facts and instead sought to prove that these individuals actually had the necessary road driving experience, even though not verified by the records. They refer generally to the deposition of Pulliam filed subsequent to the trial. However, in numerous instances pointed out by the plaintiffs, Pulliam did not have personal knowledge of the accuracy of the information stated in the applications and in some cases was not aware of it until

August of 1975, long after the individuals had been hired. Another problem with this testimony was its vagueness as to whether responsible officials knew prior to employing these applicants that they, in fact, had the required experience. In reviewing the evidence it is apparent that Terminal did not stringently conform with its eighteen-month or two-year rule for road drivers. Consequently, the *Franks* test will be applied and transferees must be afforded full company seniority for the purposes of job bidding and lay-offs on road positions. In accordance with *Franks* no constructive seniority may be created for applicants who have never worked for Terminal. All former employees may carry over any seniority accumulated prior to their departure from the company. The plaintiffs furnish no persuasive authority for crediting them with time they were not working with Terminal. The persons affected by this order will be permitted to use their seniority to bid on all vacant positions, even where there are Terminal employees on lay-offs from these openings. See *U.S.* v. *T.I.M.E.-D.C., supra* at 322-23.

Where a union engages in practices prohibited by Title VII, injunctive relief against further violation is warranted. *U.S.* v. *Local 189, United Papermakers & Paperworkers, AFL-CIO, CLC*, 282 F.Supp. 39 (E.D. La. 1968); 301 F.Supp. 906 (E.D. La. 1969), *aff'd* 416 F.2d 980 (5th Cir. 1969), *cert. den.* 397 U.S. 919 (1970). Additionally, when this conduct perpetuates the past racial discrimination of the employer the union, as well as the company, is liable for damages for back pay. *Sabala* v. *Western Gillette, Inc., supra; Johnson* v. *Goodyear Tire, Rubber Co. & Synthetic Rubber Plant*, 491 F.2d 1364 (5th Cir. 1974).

The union defendants briefly raise the point that the back pay settlement of $200,000.00 with Terminal necessarily releases all other defendants from any further award. No authority is cited for this proposition. The plaintiffs, on the other hand, urge that since the union defendants were not parties to the consent decree the company's expenditure does not settle any of their

financial claims against the unions. While the plaintiffs recently submitted some argument to support their contention, they have not addressed the question of how back pay should be apportioned among the defendants in light of the consent decree. Therefore, each party is directed to file within thirty (30) days of the date of this order a supplemental brief on the extent to which the consent decree affects the unions' liability for back pay.

Judgment is entered in favor of the plaintiffs. An order setting forth appropriate relief consistent with these findings of fact and conclusions of law will be prepared subsequent to the determination of the remaining issue relating to back pay.

So ordered this the 21 day of January, 1976.

Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

ITEM 6

ORDER

(June 28, 1976)

By order of January 21, 1976 the parties were directed to file supplemental briefs on the issue of the extent of the unions' liability for back pay in the above styled cases. Also pending are the "Government Plaintiffs' Motion to Clarify, Amend, or, in the Alternative, to Make Additional Findings," (hereinafter referred to as the government's motion for additional findings), "Private Plaintiffs' Motion to Amend or in the Alternative to Modify Judgment" (hereinafter referred to as the private plaintiffs' motion to modify), "Government Plaintiffs' Motion to Amend or, in the Alternative to Modify" (hereinafter referred to as the government's motion to modify) and "Terminal Transport's Motion to Modify the Court's Order of January 21, 1976" (hereinafter referred to as Terminal's motion to modify).

In the latter motion,[1] Terminal requests four modifications. It first seeks to change the wording of the definition of the class. In order to avoid confusion over the composition of the class, page 10 of the order of January 21, 1976 is amended to describe the class as "All present and former black employees at Terminal Transport's facilities in the State of Georgia and all black applicants for employment at the Georgia facilities whose applications were rejected." Terminal next contends that a "qualification date" rather than an "employment date" formula should be used to determine carry-over seniority. This argument was rejected in the order of January 21, 1976 and the defendant offers no persuasive reason to alter the previous holding on this issue. The third point raised by Terminal relates to the use of carry-over seniority in competing against

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[1] The government plaintiffs argue that the motion to modify was not timely filed within ten days after judgment. However, the order of January 21, 1976 was not intended as a final order or judgment but specifically reserved further rulings on the remaining issues.

employees on lay-offs. The order provided on page 12 that: "The persons affected by this order will be permitted to use their seniority to bid on all vacant positions, even where there are Terminal employees on layoffs from these openings." This conclusion was based on *U.S.* v. *T.I.M.E.-D.C.*, 517 F.2d 299, 322-23. As the defendant correctly points out, that portion of the order is broader than required by *T.I.M.E.-D.C.* Therefore, to properly reflect the language of *T.I.M.E.-D.C.* the foregoing sentence in the order of January 21, 1976 is amended to read: "The persons affected by this order will be permitted to use their seniority to bid on all vacant positions which are not purely temporary ones even where there are Terminal employees on lay-offs from these openings." A temporary vacancy is one where an employee has been laid off but recalled within thirty days. See *Freeman* v. *Motor Convoy, Inc.*, Civ. No. 16185 (N.D. Ga. Feb. 1976).

Terminal finally requests a clarification of the extent the ruling on seniority carry-over and union liability for back pay affects the timing of the execution of the obligations under the consent decree. Terminal's responsibility to distribute the $200,000.00 in compliance with the consent decree is not lessened by the imposition of liability on the union defendants for back pay. Thus, it should proceed immediately to make payments out of the fund. Moreover, Terminal should commence as soon as possible to fulfill its obligations under the consent decree of preferential employment for the affected class. Offers of jobs must be consistent with the seniority standards set forth in the order of January 21, 1976, as modified by this order.

In both the government's motion to modify and the private plaintiff's motion to modify, full retroactive seniority is sought for all black applicants who were denied employment at Terminal because of their race and for former black employees who resigned their jobs because of Terminal's discriminatory policies. In the order of January 21, 1976, at page 12, such con-

structive seniority was denied on the basis of *Franks* v. *Bowman Transportation*, 495 F.2d 398 (5th Cir. 1974). Subsequently, the Supreme Court reversed *Franks*. 44 U.S.L.W. 4356 (Mar. 24, 1976). Therefore, in light of this recent opinion the previous order is modified to provide that black applicants who were rejected for employment at Terminal on the basis of race and who now accept jobs under the consent decree must receive full seniority credit from the date each was refused employment (after July 2, 1965, the effective date of Title VII) and former black employees who left Terminal because of the company's discriminatory practices and are entitled to return to the company under the consent decree must be granted seniority during the period of their absence.

In its motion for additional findings of fact, the government plaintiffs first ask the court to find that "incumbent black city employees who pursuant to the terms of the Consent Decree, transfer to office positions covered by a collective bargaining agreement are entitled to full seniority carry-over relief." The order of January 21, 1976 dealt only with transfer to road positions. There is no evidence that Terminal rigidly adhered to its experience requirements for office workers and thus full company seniority must be afforded those members of the affected class who transfer to office positions pursuant to the consent decree. The government plaintiffs further request finding that "Terminal discriminated against blacks in the hiring of city and/or dockmen at all of its terminals except those terminals at: Atlanta, Georgia, Jacksonville, Fla., Lima, Ohio, Memphis, Tennissee, & Valdosta." Upon review of the information contained in Attachments I and II to the Stipulations and Attachment I to the government's Request for Admissions dated August 28, 1973, it must be concluded that a *prima facie* case of discrimination is established with respect to certain terminals and that the defendants have not rebutted it. Therefore, the court finds that Terminal discriminated against blacks in the hiring of city drivers and/or dock workers at the following ter-

minals: Cartersville Georgia; Dalton Georgia; Macon, Georgia; Birmingham Alabama; Chicago, Illinois; Rock Falls, Illinois; Rock Island, Illinois; Milwaukee, Wisconsin; Cincinnati, Ohio; Cleveland, Ohio; Columbus, Ohio; Dayton, Ohio; Fortoria, Ohio, Delray Beach, Florida; Detroit, Michigan; Saginaw, Michigan; Indianapolis, Indiana; Louisville, Kentucky; Nashville, Tennessee; Chattanooga, Tennessee; Orlando, Florida; St. Louis, Missouri; Tampa, Florida; and Venice, Florida. The statistics, though, when viewed in percentage terms and compared to the number of blacks in the relevant standard metropolitan statistical area,[2] see *Louis* v. *Pennsylvania Industrial Development Authority,* 371 F.Supp. 877 (E.D. Pa. 1974) *aff'd.* 505 F.2d 730 (3rd Cir. 1974), *cert. den.* 420 U.S. 993 (1975), is insufficient for a *prima facie* showing of discrimination in the terminals at Atlanta, Georgia; Jacksonville, Florida; Lima, Ohio; Memphis, Tennessee; Valdosta, Georgia; Mansfield, Ohio; Toledo, Ohio and Miami, Florida.[3]

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[2] These SMSA figures have been supplied by the government plaintiffs in their Proposed Findings of Fact No. 31.

[3] The government's own proposed finding also excludes Atlanta, Georgia; Jacksonville, Florida; Lima, Ohio; Memphis, Tennessee and Valdosta, Georgia. Using the statistics in Attachment I to the Stipulations and Attachment I to the government's Request for Admissions and the SMSA figures supplied by the government the following observation can be made:

Terminal	Total City Drivers/ Dock Workers	Black City Drivers/ Dock Workers No.	SMSA % black (as % of total)	SMSA % black
Mansfield, Ohio	17	1	5.9	6.7
Toledo, Ohio	12	1	8.3	8.2
Miami, Fla.	90	11	12.2	15.0

This comparison for each of the above terminals does not support a finding of discrimination for city drivers and/or dock workers at these locations.

In the order of January 21, 1976 both the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter referred to as "Teamsters International") and Teamsters Local 728 were found to have maintained a seniority system which discriminated against minority employees of Terminal and held responsible for back pay damages. The only remaining question is the extent of their liability in light of the consent decree whereby Terminal has agreed to pay $200,000.00 in accrued wages. The defendant unions argue that under Georgia law release of one joint tortfeasor discharges all. This common-law principle does not apply to a statutory cause of action created under federal law. *Zenith Radio Corp.* v. *Hazeltine Research,* 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 27 (1971). Rather, the scope of the release is determined by the intention of the parties. *Id.; Redel Inc.* v. *General Electric Co.,* 498 F.2d 95, 98, n. 2 (5th Cir. 1974). Here, the consent decree executed by the plaintiffs and Terminal provided on page 17 that "Terminal agrees to furnish the sum of $200,000.00 in full and final settlement as between the parties of *its alleged obligation* to provide back pay. . . ." (emphasis added). The use of the word "its" in describing the agreement to pay back wages indicates an intent to limit the full and final settlement to claims against Terminal and not to the unions as well. Moreover, it is stated on pages 19-20 that:

> **23. Release**
>
> Any person accepting financial compensation under this Decree shall sign a release (the terms of which shall be agreed upon by the parties signatory to this Decree) stating that such compensation is accepted in full and final settlement of all claims for back pay or other type of monetary compensation, against Terminal or any predecessor or successor corporation pertaining to issues which are resolved by this lawsuit based upon any pending litigation or other alleged discriminatory actions because of race occurring

> prior to the date such release is signed. The signing of such a release by an affected class member shall constitute a waiver of any rights as to any back pay or other type of monetary compensation not otherwise specifically provided for herein against Terminal or any predecessor or successor corporation which may have accrued to the Affected Class member.

This language demonstrates a purpose to restrict liability of "Terminal or any predecessor or successor corporation," and does not include the union defendants. The union defendants, then, cannot escape payment of back wages by virtue of the consent decree. Nevertheless, since no plaintiff is entitled to double recovery, *Zenith Radio Corp.* v. *Hazeltine Research, supra,* 410 U.S. at 348, 28 L.Ed.2d at 97, the unions may offset against any claim for back pay by a present or former employee[4] of Terminal the amount which such a person is entitled to receive from Terminal under the consent decree.

Accordingly, the government's motion for additional findings is granted in part, the private plaintiffs' motion to modify and the government's motion to modify are both granted, and Terminal's motion to modify is granted in part and denied in part.

Furthermore, in addition to the directives and prohibitions set forth in the "Consent Decree in Partial Resolution of Suit,"[5] it is hereby ordered that

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[4] The union defendant cannot be held accountable to applicants who were denied initial employment with Terminal because their violation of Title VII, maintaining the seniority system, affected only those who were already hired by Terminal.

[5] The consent decree contains injunctive relief and back pay awards against the defendant, Terminal Transport Company, Inc.

1. The defendants, Teamsters International, Teamsters Local 728 and their agents, employees, successors and all persons in active concert or participation with them are permanently enjoined from maintaining or enforcing the seniority provisions in the collective bargaining agreements with Terminal Transport Company, Inc., in such manner as to discriminate against any individual because of race or color;

2. All class members, as defined in this order, and all members of the affected class under the consent decree who are hired by Terminal or transfer to a different position shall be afforded seniority for bidding and lay-off purposes consistent with the terms of the order of January 21, 1976, as modified by this order;

3. The parties are directed to establish a procedure including reference to a special master, if necessary, for the determination of back pay claims against the defendant unions. If the parties cannot agree to such a plan within sixty (60) days from the date of the filing of this order, they shall so notify the court in writing and submit briefs in support of their respective positions.

So ordered this the 28 day of June, 1976.

Albert J. Henderson, Jr.
Judge United States District Court
for the Northern District of Georgia

ITEM 7

ORDER

(December 30, 1977)

The parties to these consolidated actions appeared for a conference with the court on December 28, 1977, at which time the following proceedings were had:

1. In light of recent cases in the Supreme Court and the Court of Appeals for the Fifth Circuit, *International Brotherhood of Teamsters* v. *United States,* 431 324 (1977) (hereinafter referred to as "Teamsters"): *United States* v. *East Texas Motor Freight System, Inc.,* (No. 75-3332) (5th Cir. Dec. 5, 1977) (hereinafter referred to as "East Texas"), all prior orders in these suits, including those incorporating findings of fact and conclusions of law, are hereby amended as follows:

A. No relief may be granted for discrimination occurring prior to July 2, 1965, the effective date of Title VII. Accordingly, any awards of seniority prior to that date are vacated and such seniority shall be computed from July 2, 1965.

B. Union liability under Title VII may not be predicated upon a *bona fide* seniority plan established prior to July 2, 1965, even though it perpetuates the effects of past discrimination. See Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h); *Teamsters, supra.* The seniority plan at issue in these actions is a *bona fide* plan within the meaning of Section 703(h). Therefore, previous findings of liability of the unions are vacated. However, the unions remain proper parties to these actions under Rule 19(a), Fed.R.Civ.P., in order to provide complete relief.

2. Comments by the court of appeals in the *East Texas* decision and cases cited therein lead the court to conclude that the principles in *Teamsters* are not to be limited to Title VII suits but also apply to actions brought pursuant to Executive Order 11246 as well as 42 U.S.C. §1981. See *East Texas, supra,* slip

opinion at p. 1041. The plaintiffs' claims of broader union liability and retroactive seniority pre-dating Title VII under 42 U.S.C. §1981 are denied.

3. Notice to class members will not be reopened. Members of the class were adequately notified of these actions on two prior occasions from addresses furnished by the plaintiffs' attorneys or by the defendants' attorneys with the plaintiffs' knowledge. The failure of some class members to make response and to keep their addresses current constitutes a waiver of their individual claims.

4. The parties agreed to confer in an effort to reach a common understanding of the definition of "vacancy" to be applied in determining seniority dates and in granting relief. For purposes of establishing individual seniority dates, a vacancy, however defined, shall be deemed to have existed if Terminal hired a white employee for regular employment in the position for which a black applied within 90 days following the date of his application.

5. Applicants, whether persons applying for the employment the first time or incumbents applying for a transfer, need only initially prove that an application for employment or transfer was made and the date thereof. The burden then shifts to the defendants to show that he was refused employment for nondiscriminatory reasons. Nonapplicant incumbents bear an initial heavier burden of proving that they would have applied for a particular position but were prevented from doing so by the company's discriminatory policies and the date on which they would have applied and their qualifications. It will then become the burden of the defendants to demonstrate that they would have been denied employment for nondiscriminatory reasons.

6. The claims of Erwin Jones, Otis Abron and Roland Perrin to preferential employment will be determined at the evidentiary hearing in which disputed seniority dates will be decided.

7. Within thirty (30) days of the date of this order, the plaintiffs are directed to submit to the defendants and to the court a comprehensive and complete list of class members claiming retroactive seniority by category showing the alleged seniority date and reasons therefor with supporting documents.

8. Within sixty (60) days of the date of this order, the defendants are directed to submit to the plaintiffs and to the court any challenges to individual seniority dates and the reasons therefor with supporting documents. Those seniority dates not so challenged shall be deemed valid and will constitute the effective date for relief.

9. The parties shall confer within one hundred twenty (120) days of the date of this order to reconcile their differences. Those seniority dates on which the parties are unable to agree after conference shall be submitted to the court at the end of that period. They will then be considered in an evidentiary hearing before a forum to be designated at a later date.

So ordered this the 30 day of December, 1977.

Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

ITEM 8

ORDER
(June 27, 1978)

The parties having been heard and in the light of the decision of the Supreme Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), it is hereby ORDERED that:

1. The following Affected Class Members are awarded remedial seniority as follows:

1. John Allen 9/28/65* (Road) Atlanta/Cartersville
2. Robert Walker 9/29/65* (Road) Atlanta/Cartersville
3. Willie Simmons 2/4/68 (Road) Atlanta/Cartersville
4. Frank Hixson 9/29/68 (Road) Atlanta/Cartersville
5. David T. Brown 10/6/68 (Road) Atlanta/Cartersville
6. Willie Dixson 9/16/71 (Road) Atlanta/Cartersville
7. James Powell 11/11/72 (Road) Atlanta/Cartersville
8. Cassanova White 9/24/73 (City) Cincinnati
9. Henry Todd 5/29/69 (Road) Louisville
10. Ernest Partee 12/18/72 (Road) Nashville
11. Alonzo Davis 7/11/68 (Road) Nashville
12. Louis Montgomery 9/20/67 (City) Nashville
13. Hampton Pringle 9/22/70 (Road) Nashville
14. Ernest Southall 10/10/73 (Road) Nashville

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* The Agreement of the *Allen* Plaintiffs to those seniority dates is without prejudice to their previously asserted claims for pre-1965 seniority.

2. Additionally, J. L. Perkinson, Lawrence Jones, Clarence Wells and Jasper Browner shall be offered city positions at the Cartersville terminal as vacancies arise and in the order listed. The class member filling the first vacancy so offered shall be assigned a remedial seniority date of October 24, 1972 and the class member filling the second such vacancy shall be assigned a remedial seniority date of October 29, 1972. Additional vacancies, if any, will be filled on the basis of employment date seniority.

3. For those transferring incumbent and former incumbent class members (John Allen, Robert Walker, James Powell, Henry Todd, Ernest Partee, and Alonzo Davis), the seniority awarded herein shall be for bid, layoff and recall purposes; company seniority shall be used for all other purposes. For all others, the seniority awarded herein shall be for all purposes.

4. This Court's Order of October 28, 1977, suspending future remedial seniority to those who accept preferential employment under the Consent Decree pending resolution of the seniority issue, is hereby modified to provide that offers of employment shall be made to the class members identified in paragraphs 1 and 2 above pursuant to paragraph 20 of the Consent Decree as vacancies arise. The seniority established herein for those class members shall be final and binding.

5. Each of the following class members who has already transferred pursuant to the Consent Decree and prior orders of this Court and whose seniority is adjusted herein may, within 30 days of notification of such adjustment, return to the job from which he transferred with no further rights to transfer under the Consent Decree and shall, thereafter, exercise full seniority for all purposes in the job to which he returns as though no transfer had occurred:

1. Frank Hixson;
2. David T. Brown;
3. James Powell;
4. Willie Simmons;
5. Henry Todd;
6. Hampton Pringle;
7. Alonzo Davis;
8. Ernest Partee;
9. Robert T. Jones;
10. James Robertson; and
11. Herbert Sweet

6. It appears to the Court that Erwin Jones, Plaintiff in Civil Action No. C74-2045A, has waived and withdrawn his claim for retroactive seniority. It is therefore ORDERED that Erwin Jones be given no retroactive or remedial seniority in this case. It is further ORDERED that the Clerk of Court enter final judgment for the Plaintiff in Civil Action No. C74-2045A, pursuant to Rule 58, F.R.C.P., with Jones to take nothing and Terminal to take nothing, and each party to bear his own costs.

7. The parties are authorized to notify members of the Affected Class of the contents of this Order.

SO ORDERED, this ____ day of _____, 1978.

Albert J. Henderson, Jr.
Judge, United States District Court
For The Northern District Of
Georgia, Atlanta Division

ITEM 9
ORDER
(June 30, 1978)

Presently pending in the above styled action is the union's motion to reconsider the order of June 15, 1978, setting forth procedures for submission of disputed seniority claims to a special master. The union suggests that the union grievance procedures be employed to resolve the claims and also objects to being assessed 50% of the masters fees and costs.

The parties appeared at a conference on this date for arguments on the motion to reconsider. In view of the plaintiff's objections to using the union grievance procedure to resolve their statutory rights and the fact that such an approach would in all probability not be conclusive or afford a complete record for reivew, it was decided that the former course would be followed and disputed claims will be submitted to a special master to be chosen from candidates furnished by the parties and including members of the American Arbitration Association, the legal community and candidates familiar with Title VII cases.

Questions regarding collateral benefits for class members awarded retroactive seniority dates should be resolved by the parties to the greatest extent possible, with requests for clarification of prior orders made by informal letter and only where a full attempt by the parties to resolve their differences has been unsuccessful. The issue of attorneys fees is reserved until the conclusion of the relief stage of this litigation.

Accordingly, the motion to reconsider is denied. The parties are directed to submit the names of candidates for special master with accompanying background data and qualifications to the court within ten (10) days of the date of this order.

So ordered this the 30 day of June, 1978.

Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

ITEM 10

ORDER
(March 15, 1979)

Pursuant to the order of October 23, 1978, the special master filed his statement of expenses incurred in preparation of his report and recommendation and copies were served on all parties. To date no objection from any party has been received by the court. The statement of expenses has been examined and appears reasonable for the services rendered.

Accordingly, pursuant to the order of June 15, 1978 the union and the employer are each directed to tender the sum of $2,256.00 into the registry of the court within fifteen (15) days of the filing of this order.

So ordered this the 15 day of March, 1979.

Albert J. Henderson
Judge, United States District Court
for the Northern District of Georgia

ITEM 11

ORDER
(April 20, 1979)

Presently pending in the above styled actions is the report of the special master dated January 18, 1979 and the parties' objections and responses thereto.

The International Brotherhood of Teamsters (hereinafter referred to as the "union") raises several objections to the portion of the report dealing with seniority in general. None of them are meritorious and only two bear mention.

The special master correctly allocated the burden of proof according to Paragraphs 4 and 5 of the order of December 30, 1977. That order was premised on *International Brotherhood of Teamsters* v. *United States,* 97 S.Ct. 1843 (1977), and *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976), which established the burden of proof at the remedial juncture of cases in which the employer has been adjudicated to have engaged in a policy of discriminatory employment practices. The judicial determination of the existence of such a pattern or practice creates a presumption which carries over to the remedial stage that each potential victim was subjected to discrimination in the refusal to hire. Individual claimants must prove that they applied for work or would have but for the futility of doing so in the face of the employer's policy and the defendants then have the burden of showing that any individual employment decision was not the result of unlawful discrimination. *Teamsters* v. *United States, supra,* 97 S.Ct. at 1866-73; *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 772-73 and n. 32.

The discussion in *Board of Trustees of Keene State College* v. *Sweeney,* 99 S.Ct. 295 (1978), and *Furnco Construction Corp.* v. *Waters,* 98 S.Ct. 2943 (1978), involved the liability stage of the proceedings and the same inferences are not present in such cases, as opposed to those in which there has been a judicial

determination of discrimination. In fact, the Court in *Furnco*, on which *Keene* relies, expressly distinguished its ruling from *Teamsters*. *Furnco Construction Corp.* v. *Waters, supra,* 98 S.Ct. at 2948 n. 7. Moreover, the Fifth Circuit Court of Appeals recently reaffirmed the *Franks* and *Teamsters* allocation of the burden of proof in a decision rendered nearly a month after *Furnco*. *Pettway* v. *American Cast Iron Pipe Co.,* 576 F.2d 1157 (1978), *cert. den.,* 99 S.Ct. 1020 (1979). In short, *Furnco* and *Keene* do not alter the holdings in *Franks* and *Teamsters* and the latter two decisions control the present actions.

The union challenges the special master's use of the definition of "vacancy" set forth in the order of December 30, 1977 at Paragraph 4. This issue grows out of the defendants' burden of proving that each potential victim of discrimination was, in fact, not subjected to an employment decision unlawfully tainted by his race. One way to satisfy this burden is to establish the absence of an available position and not the applicant's race as the reason for not hiring a particular claimant. *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 772-73 and n. 32. Therefore, the question of what constitutes a vacancy is one that the defendants must answer to the court's satisfaction and not vice-versa.

* * *

The ninety-day criterion adopted in the order of December 30, 1977 was based primarily on the consent decree of August 5, 1975 at paragraph 18(d)(3) entered into by the plaintiffs and Terminal Transport Co., Inc. (hereinafter referred to as "Terminal Transport"). Although neither the union nor Local No. 728, International Brotherhood of Teamsters (hereinafter referred to as "Local 728") signed the consent decree, that agreement is entitled to some weight since apparently the employer thought that a ninety-day period for vacancies was a reasonable proximation of its actual hiring practices.

In its objections the union suggests no alternative method of determining whether a vacancy existed for which a class member would have been considered. In addition, the union never objected to the definition of vacancy adopted in the December 30, 1977 order. To the contrary, the union relied upon that definition in responding to the seniority dates claimed by the plaintiffs. See pleadings filed by the union on March 1 and 2, 1978.

The remainder of the objections and responses worthy of mention will be discussed with respect to the individual claimants.

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Note Explaining Deletion

[Findings with respect to individual claimants elsewhere in this system are not here reproduced. These were individuals in the Governments's pattern and practice suit, viz: at St. Louis (Bea and Cooper); Tampa (Everett); Orlando (Peyton and James); Nashville (Battle) and Louisville (Harris).

The only Georgia claimants as to whom there was no agreement were:

Clarence Beasley (awarded September, 1965, road seniority);

William Beasley (claim denied);

Jessie Jackson [Johnson] (claim denied);

Donald Dixon (claim denied).]

• • •

Willie Beasley

The private plaintiffs object to the special master's conclusions that there was no vacancy available when Beasley applied for a road position at the Atlanta terminal in 1964 and 1969.

The 1964 application prior to the effective date of Title VII, is not alone proof that Beasley was deterred by any perceived discriminatory policy of Terminal Transport from making future requests. The private plaintiffs do not challenge the special master's finding that no white was hired within ninety days of Beasley's 1964 application and, consequently, the defendants have met their burden of proving that no vacancy existed when Beasley applied. That, then, leads to the conclusion that Beasley was not employed for reasons other than race and, hence, he could not have been deterred from future applications simply because the 1964 attempt was unsuccessful. As the special master noted, Beasley presented no other evidence that would have led a reasonable person to believe that future applications of blacks for road jobs at Atlanta would be futile.

As for the 1969 application, the private plaintiffs contend that Beasley sought employment within ninety days of the hiring of a white on September 19, 1969. The special master found that Beasley's application was attempted in March of that year. Three times during the hearings before the special master Beasley testified that the 1969 application attempt occurred "early in 1969" or the spring or March of that year. 1 T at 72 and 92-93. Once he said that it was three or four months prior to December 30, 1969. 1 *id.* at 91-92. His testimony primarily indicated that he could not remember when he applied and at best it shows that it was well over ninety days before the hiring of a white in September. The special master's findings are approved.

The private plaintiffs also insist that, pursuant to the order of June 27, 1978, Beasley should be entitled to an additional option allowing him to return to a city driving job. Apparently they refer to Paragraph 5 of that order. If the parties consent to such a move the court has no objection. Therefore, the schedule suggested by the special master for exercising Beasley's options shall be stayed for fifteen days from the filing of this order so that the private plaintiffs can attempt to gain consent for the additional option.

Jessie Johnson and Donald Dixon

All parties except Terminal Transport objected to some aspect of the special master's finding that no vacancy existed within ninety days of Johnson's and Dixon's attempts on April 28, 1972 to apply for road positions at the Cartersville terminal. The court agrees with this finding.

The government and the private plaintiffs primarily argue that the defendants' witness, Rudy Pulliam, could not testify with certainty as to the date on which a decision was made to add twenty-two drivers to the Cartersville regular list from that terminal's casual board. Pulliam stated that he met with union representatives and agreed to create a certain number of regular vacancies pursuant to a provision in the collective bargaining agreement requiring such action when casuals were being heavily employed. 5 T at 16-17, 25, 36 and 38. Whenever the union pressed for more regular slots, Pulliam virtually always filled them with the most senior drivers on the casual board, as he did in this instance. 5 *id.* at 15-16, 23, 36 and 38.

Because the earliest seniority date for these twenty-two drivers was April 23, 1972, Pulliam assumed that the meeting with the union officials occurred before that time since it was never his practice to establish seniority dates earlier than the day on which the company agreed to create new regular positions. 5 *id.* at 32. The plaintiffs contend that the date of the meeting is not necessarily the date of the agreement to hire these twenty-two specified individuals. However, since Pulliam always filled such places with casual board drivers both decisions, practically speaking, were made at the same time. See 5 *id.* at 31. Therefore, the record supports the special master's conclusion that all twenty-two regular positions were, in effect, created and filled prior to April 23, 1972, five days before Johnson and Dixon applied. Since the next seniority date was September 5, 1972 it appears that no vacancy existed on April 28, 1972.

Without doubt Pulliam routinely supplied new regular positions from an all-white pool of white drivers based on a seniority system that was not a part of the collective bargaining agreement and did so under the mistaken belief that this procedure was required by that agreement. 5 *id.* at 36-38. Nonetheless, even assuming that such a practice was discriminatory, the issue under *Franks* and *Teamsters* is whether a vacancy actually existed on April 28, 1972. The defendants have shown that, under the agreed-upon definition, there was no vacancy.

The special master's decision to give credence to virtually all of Pulliam's testimony and the inferences he drew from it were not clearly erroneous. The claims of Dixon and Johnson for retroactive seniority are denied.

• • •

The special master's findings and conclusions as to Clarence Butts and Douglas Pointer are adopted and the union's objections are without merit. No party has controverted the findings involving Otis Abron, Jr., Roland Perrin, Jr. and Arthur Lee Watson, and upon consideration the special master's findings are approved.

Accordingly, the special master's report of January 18, 1979 as herein modified and supplemented is adopted as the order of this court . . . .

So ordered this the 17 day of April, 1979.

/s/ Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

ITEM 12

FINAL JUDGMENT
(April 28, 1980)

This action came on for consideration before the Court, Honorable ALBERT J. HENDERSON, U. S. Circuit Judge, sitting by designation as United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

FINAL JUDGMENT IS ORDERED AND ADJUDGED as follows:

1. Pursuant to the Order of December 27, 1973 dismissing the claims of the Plaintiffs Charles Heard, Jr., Dempsey Henderson, Thomas S. Reese and Lewis Weems against Defendant TERMINAL TRANSPORT COMPANY, and that Defendant TERMINAL TRANSPORT COMPANY recover from Plaintiffs Heard, Reese and Weems its costs of action;

2. Pursuant to Consent Decree of August 4, 1975, defining the Affected Class to include "all Black employees of TERMINAL TRANSPORT, present and past, and all Black applicants for employment by TERMINAL TRANSPORT who were refused employment by TERMINAL TRANSPORT, insofar as they were affected by any act of racial discrimination occurring since July 2, 1965, to the date of entry of this Decree," enjoining Defendant TERMINAL TRANSPORT COMPANY from engaging in racial discrimination, granting preferential hiring rights to Plaintiffs and class members, and directing payment of backpay to Plaintiffs and class members by Defendant TERMINAL TRANSPORT COMPANY;

3. Pursuant to the Order of June 28, 1976 certifying the Private Plaintiffs' Class to include "all present and former black employees at TERMINAL TRANSPORT'S facilities in the State of Georgia and all black applicants for employment at the Georgia facilities whose applications were rejected."

4. Pursuant to the Order of November 2, 1976 denying inclusion of Defendant TERMINAL TRANSPORT COMPANY'S FICA tax obligation within Consent Decree of August 4, 1975;

5. Pursuant to the Order of June 10, 1977 awarding seniority benefits to Plaintiffs and class members;

6. Pursuant to the Order of July 14, 1977 excluding John Pasley from certified class, approving revised appendices to the Consent Decree of August 4, 1975, and directing payment of backpay, Attorney fees, and costs by Defendant TERMINAL TRANSPORT COMPANY under the Consent Decree of August 4, 1975;

7. Pursuant to the Order of December 30, 1977 dismissing the Private Plaintiffs' claims under 42 U.S.C. Section 1981 in part, vacating seniority awards which predate July 2, 1965, vacating the previous findings of liability of Defendants INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and TRUCK DRIVERS AND HELPERS LOCAL UNION NUMBER 728, and retaining said Defendant Unions as Rule 19 (a) FRCP parties;

8. Pursuant to the Orders of June 16, 1978 and March 15, 1979 directing the payment of the fees and expenses of the Special Master by TERMINAL TRANSPORT COMPANY in the sum of TWO THOUSAND TWO HUNDRED FIFTY-SIX DOLLARS ($2,256) and by Defendants INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA and TRUCK DRIVERS AND HELPERS LOCAL UNION NUMBER 728 in the sum of TWO THOUSAND TWO HUNDRED FIFTY-SIX DOLLARS ($2,256) for a total of FOUR THOUSAND FIVE HUNDRED TWELVE DOLLARS ($4,512);

9. Pursuant to the Order of June 27, 1978 awarding retroactive seniority to Plaintiffs John Allen, Robert Walker, Willie Simmons, Frank Hixson, David T. Brown, Willie Dixson, James Powell, Cassanova White, Henry Todd, Earnest Partee, Alonzo Davis, Louis Montgomery, Hampton Pringle, Earnest Southall, and awarding other compensatory seniority to certain Plaintiffs and class members;

10. Pursuant to the Order of April 20, 1979 awarding retroactive seniority to Robert Bea, Kenneth Cooper, Bryant Everett, Leroy Peyton, Walter James, James Russell Harris, Clarence Butts, Douglas Pointer, and denying retroactive seniority to Willie Beasley, Jessie Johnson, Donald Dixon, Wyman Battle, Arthur Lee Watson, and awarding reinstatement to Roland Perrin, Jr., and denying reinstatement to Otis Abron, Jr.;

11. Pursuant to the Order of June 25, 1979 awarding Plaintiffs John Allen, Robert Walker and Clarence Butts drop and hook pay against TERMINAL TRANSPORT COMPANY;

12. Pursuant to the Order of June 28, 1979 awarding Plaintiffs Frank Hixon, Robert Walker and class members seniority, vacation benefits and holiday pay against TERMINAL TRANSPORT COMPANY;

13. Pursuant to the Order of March 10, 1980 awarding Attorney fees to the Private Plaintiffs in the sum of THIRTY-THREE THOUSAND FIVE HUNDRED THIRTY-FOUR DOLLARS AND NINE CENTS ($33,534.09) against Defendant TERMINAL TRANSPORT COMPANY and in the sum of SIXTEEN THOUSAND SEVEN HUNDRED SIXTY-SEVEN DOLLARS AND FIVE CENTS ($16,767.05) against Defendants INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and TRUCK DRIVERS AND HELPERS LOCAL UNION NUMBER 728 for a total recovery of FIFTY THOUSAND THREE HUNDRED ONE DOLLARS AND FOURTEEN CENTS ($50,301.14).

14. This Judgment supersedes the Judgments dated March 20, 1980 and the judgments dated March 24, 1980 in these cases.

Dated at Atlanta, Georgia this 28th day of April, 1980.

BEN H. CARTER
CLERK OF COURT

ITEM 13

42 U.S.C. § 2000e *et. seq.*

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of

such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

* * *

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any

employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

* * *

42 § 2000e-5

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the

complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act,[1] the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful

employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable

by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

* * * * *

Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

§ 2000e-6. Civil actions by the Attorney General

Complaint

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

* * *

Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

(c) Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to

the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1126

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

TRUCK DRIVERS AND HELPERS LOCAL UNION
No. 728

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Petitioners,

v.

JOHN T. ALLEN, *et al,*

Respondents.

OPPOSITION OF INDIVIDUAL RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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Dated: January 18, 1982

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTIONS PRESENTED

1. Did the district court err in directing the defendant unions to pay a portion of the attorneys' fees awarded to counsel for plaintiffs where the plaintiffs prevailed over the positions asserted by the unions in the litigation and relief was awarded against the unions?

2. Did the district court err in directing the defendant unions to pay a portion of the fee of the Special Master in view of the unsuccessful positions advocated by the unions in the master's hearings?

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IN THE

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OCTOBER TERM, 1981

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TRUCK DRIVERS AND HELPERS LOCAL UNION No. 728

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioners,

vs.

JOHN T. ALLEN, et al,

Respondents.

OPPOSITION OF INDIVIDUAL RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

Respondents, John T. Allen, et al., oppose the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on August 21, 1981, rehearing denied, September 18, 1981.

STATEMENT OF THE CASE

A. History of the Litigation.

These are consolidated employment discrimination actions brought in 1972 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., and 42 U.S.C. §1981, by black employees of the defendant trucking company and by the United States. After several years of litigation, the company agreed as part of a settlement with the plaintiffs to offer employment as over-the-road drivers to black applicants and employees who had been denied these jobs in the past, and to pay backpay in the amount of $200,000 to the members of the class. Since the union defendants were not parties to the settlement, the company could not grant seniority credit to the classmembers who obtained road driver jobs without violating its collective bargaining agreement. The entitlement of classmembers to compensatory seniority was therefore reserved for future decision by the district court. App. 50.

In order to determine whether the plaintiffs were entitled to retroactive seniority, the district court first had to decide whether the company had discriminated on the basis of race in its hiring and initial job assignment practices. Since the company had eliminated its exposure for backpay through the settlement and it did not have a strong interest in the seniority issue, it took a minimal role in the trial of these issues. The union defendants, however, vigorously contended that the company had not engaged in any discriminatory practices and otherwise opposed all elements of the plaintiffs' case.*/

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*/ Thus, the unions contested the plaintiffs' right to introduce statistical evidence, stipulated to by the company, which formed the basis for the plaintiffs' prima facie showing of discrimination in hiring and assignments. In addition, the unions introduced their own statistical analysis purporting to show that the company's hiring practices had not been discriminatory. And, they conducted the principal cross-examination of each of the plaintiffs and other discriminatees who testified.

Following the Stage I hearing, the district court entered Orders finding the company and the unions liable for discrimination and ordering that members of the class were entitled to compensatory seniority. App. 53-65, 66-72. After this Court's decision in Teamsters v. United States, 431 U.S. 324 (1977), the district court established a procedure for the determination of final seniority dates for all classmembers. The court also vacated its prior finding of liability and award of backpay against the unions, in light of Teamsters, but it directed that "the unions remain proper parties to these actions under Rule 19(a), Fed. R. Civ. P., in order to provide complete relief." App. 73.

In January, 1978, the plaintiffs submitted to the court detailed information supporting the claims of individual plaintiffs and classmembers to compensatory seniority relief. The unions objected, either wholly or in part, to a majority of these claims on the ground that plaintiffs had failed to demonstrate the claimants' entitlement to relief. Subsequently, the plaintiffs and the

unions negotiated an agreement granting seniority to a number of the challenged claimants, and the remaining claims were referred, pursuant to Rule 53, F.R. Civ. P., to a Special Master. Also referred to the Master was the issue of whether compensatory seniority could be used to bid for job vacancies against laid-off employees who had a contractual right to recall for a period of three years.

In the evidentiary hearing held before the Special Master in December, 1973, the unions opposed the individual claimants' entitlement to seniority relief and the right of classmembers to use their seniority against laid-off employees. Following the hearing, they filed exceptions to the Master's Report insofar as it recommended the award of compensatory seniority to several of the claimants and also recommended that the contractual rights of laid-off incumbent employees should not take precedence over the rights of classmembers. Final judgment was subsequently entered by the district court substantially adopting the Master's recommendations. App. 81-86, 87-90.

B. The Decisions Below With Respect To Attorneys' Fees.

After final resolution of the case on the merits, the district court awarded attorneys' fees and litigation expenses to counsel for the individual plaintiffs in the amount of $50,301.14. 486 F.Supp. 1195, App. 14-29. In its opinion, the court reviewed the role of the unions throughout the long course of the litigation:

> While the thrust of this suit was against [the company], and even though after the decision in Teamsters it appeared that no relief would be ordered against them, the unions apparently felt they had a real and significant interest in the outcome of the cases. They determined to protect this interest by assuming for themselves an active role. Hence, in the negotiations following entry of the consent decree the unions often carried the laboring oar, in some cases to the exclusion of [the company]. They participated fully in negotiations over the extent of the retroactive seniority for individual class-members, and at hearings before the special master.

App. 26. The court concluded that the unions had "participated substantially in opposing the legitimate demands of the plaintiff class," App. 27, and that "had the unions not been so steadfast in their opposition this controversy might have ended sooner." App. 27. Accordingly, the court directed that one-third of the award should be paid by the unions.*/

The decision of the district court awarding attorneys' fees against the unions was affirmed by a panel of the Court of Appeals for the Fifth (now Eleventh) Circuit. App. 1-11. The court expressly affirmed the district court's findings that plaintiffs had prevailed in the case and that the unions had opposed the legitimate claims asserted by the plaintiffs. App. 6-9. The court also found that the unions' rationalization of their opposition to the company's liability was "self-serving" and "neither an accurate

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*/ A settlement has been entered with respect to the company's 2/3 share of the award and its contingent liability for the other 1/3 if the unions are absolved.

nor a complete picture of events running through the hearing before the special master in December of 1978." App. 6.

REASONS FOR DENYING THE WRIT

The petition fails to demonstrate the existence of sufficient grounds for granting a writ of certiorari in this case.

1. The Decision of the Court of Appeals Is Fully Consistent with the Decisions of this Court.

Contrary to the petitioners' contention, the decision of the court of appeals in this case does not ignore the principle that a party must "prevail" in order to receive an award of attorneys' fees under section 706(k) and 42 U.S.C. §1988. See, e.g., Hanrahan v. Hampton, 446 U.S. 754 (1980).[1/] The court expressly considered

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1/ The unions' reliance on Hanrahan v. Hampton, 446 U.S. 754 (1980), is misplaced. There, the district court directed verdicts in favor of the defendants, but the court of appeals reversed and remanded the case for a new trial. This Court set aside the appellate court's award of attorneys fees to the plaintiffs on the ground that,

and affirmed the findings of the district court that the plaintiffs had prevailed over the positions vigorously advanced by the union defendants in opposition to their claims for relief. App. 5-8. These findings are fully supported in the record.[2/]

1/ cont'd from previous page

notwithstanding the favorable interlocutory rulings obtained by the plaintiffs, they had not yet prevailed on the merits of their claims. In this case a final judgment was entered in favor of the plaintiffs and no appeal was taken on the substantive aspects of the case.

2/ Thus, in the stage I proceedings on liability, the unions strenuously resisted plaintiffs' efforts to prove the existence of classwide discrimination in hiring and initial job assignments. The district court's findings that the company had engaged in discriminatory hiring and assignment practices provided the legal predicate for the individual seniority relief ultimately awarded by the district court. See, Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transportation, 424 U.S. 747 (1976). Even after the unions were absolved of any direct liability, they assumed an adversary posture with respect to the legitimate claims of the plaintiffs for compensatory seniority. In spite of the unions' objections and arguments, a large number of the plaintiffs and classmembers obtained seniority relief through negotiations with

Although the unions were not found liable in their own right for a violation of Title VII or 42 U.S.C. §1981, the plaintiffs did prevail over the unions' contentions with respect to the issue of discrimination vel non, the entitlement of individual claimants to seniority relief, and the issue of how compensatory seniority could be used; and relief was ordered by the court against the unions. The statutes authorizing the award of attorneys' fees in civil rights cases such as this one, 42 U.S.C. §§1988, 2000e-5(k), do not on their face limit the parties against whom attorneys' fees may be awarded to those who have violated the underlying statute. And, this Court has held that an award may be entered under 42 U.S.C. §1988 in the absence of a final judgment of liability against the defendant. See, Maher v. Gagne,

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2/ cont'd from previous page

the unions and the ruling of the Special Master. In addition, the plaintiffs prevailed over the unions' position concerning the hotly contested issue of whether the plaintiffs and classmembers could use the compensatory seniority awarded by the court to fill job vacancies where incumbent employees had contractual recall rights to fill those jobs. Cf. Teamsters v. United States, supra, 431 U.S. at 372-376.

448 U.S. 124 (1980); see also Delta Air Lines, Inc. v. August, 101 S.Ct. 1146, 1155 (1981) (Powell, Jr., concurring).

The assessment of attorneys' fees against all of the nonprevailing parties in accordance with their relative contribution to the expense of the litigation, as was ordered here, gives a practical and flexible interpretation to the fee statutes which is consistent with their remedial purpose.[3/]

3/ The unions suggest that the award was improper because they remained in the case under Rule 19 simply to provide guidance and assistance to the district court. See, Petition For Writ of Certiorari, pp. 12-13. There is nothing in Rule 19, however, which excludes an award of attorneys' fees against a defendant joined as a necessary or indispensable party. Furthermore, while some Rule 19 defendants do limit themselves to a formal or an advisory role, the unions here were found to have participated actively in the litigation in resisting the successful claims of the plaintiffs. Under these circumstances, the court of appeals properly ruled that, as active litigants, the unions should be responsible for a portion of the fee award.

This Court has held that the purpose of fee awards in civil rights cases is to encourage aggrieved individuals to sue to enforce their rights. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980); Christiansburgh Garment Co. v. E.E.O.C., 434 U.S. 412, 420 (1978). Since the purpose of fee awards is not to punish the nonprevailing party, the fact that a party has not violated the underlying statute is not dispositive. If co-defendants in the position of petitioners are immune from attorneys fee awards, they will have no incentive to support the voluntary resolution of litigation. See, Copeland v. Marshall, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc); Dennis v. Chang, 611 F.2d 1302, 1307 (9th Cir. 1980). And, it will deter settlements by employers in employment discrimination cases, if following settlement they can be held liable for attorneys fees resulting from a union's litigation of issues for which the employer has no stake in the outcome.

In sum, the decision below is fully consistent with decisions of this Court

construing the civil rights attorneys' fees statutes and with the language and purposes of the statutes.

2. The Decision of the Court of Appeals Does Not Conflict With The Decision of Any Other Court of Appeals And Does Not Present An Important Issue of Federal Law.

The decision of the court of appeals in this case is not in conflict with the decision of any other court of appeals. The only other decision in which a related issue has been presented reached the same result as here. See, Moten v. Bricklayers, Masons and Plasterers, 543 F.2d 224, 240 (D.C. Cir. 1976); see also, Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979). In Moten, the court affirmed an award of attorneys' fees against a contractor's association which had intervened in a Title VII action in opposition to a consent decree agreed to by the plaintiffs and the defendant union. The court held that the association was liable for a portion of the fee award, even though it was not found liable for any violation, because "the plaintiffs were compelled to defend

against its efforts in order to maintain their hard-won settlement agreement." 543 F.2d at 239.

Not only is there no conflict in the decisions, the issue of a unions' liability for attorneys' fees for participating in the defense of a Title VII action has not even arisen in any other reported case. Moreover, the unions' contention that the award against them is unfair because they were willing from the onset of the litigation to provide make-whole seniority relief to victims of discrimination, even if true,[4/] is the result of the peculiar chronology of this case and

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4/ As the court of appeals found, this rationalization is plainly self-serving and not supported by the record as a whole. Moreover, in order to avoid the broad relief sought by the plaintiffs, the unions were not required to attempt to demonstrate the nonexistence of any discriminatory practice by the employer. The unions could have limited their opposition to the legal position that the plaintiffs were not entitled to the full relief sought notwithstanding the employer's discrimination.

is unlikely to recur in the future. The issue of liability was litigated in this case prior to this Court's decisions in Franks and Teamsters which clarified the extent to which seniority relief may be obtained by plaintiffs who demonstrate discrimination in violation of Title VII. Since they no longer can be held liable in their own right in cases such as this, except under exceptional circumstances, unions which elect to oppose the claims of plaintiffs as to employers' discrimination will have no possible argument of unfairness if fees are awarded against them because of their position.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: January 18, 1982

Opposition

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Opposition

2

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No. 81-1126

In the Supreme Court of the United States

OCTOBER TERM, 1981

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, ET AL., PETITIONERS

v.

JOHN T. ALLEN, ET AL., AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that the district court did not abuse its discretion in assessing the union defendants one-third of an award of attorney's fees and one-half the costs of a special master, and in denying the unions their costs, where plaintiffs prevailed in obtaining significant rightful-place seniority relief over the unions' steadfast opposition.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 653 F. 2d 1016. The opinion of the district court (Pet. App. A-14 to A-29) is reported at 486 F. Supp. 1195.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1981. A petition for rehearing was denied on September 18, 1981. (Pet. App. A-12 to A-13). The petition for a writ of certiorari was filed on December 15, 1981. Petitioners invoked this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), is set forth at Pet. App. A-98.

STATEMENT

On June 2, 1972, John T. Allen and ten other present and past employees of Terminal Transport Company filed a private class action under 42 U.S.C. 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against the company and Teamsters Local 728. They alleged that the union and Terminal had discriminated against blacks at Terminal's Georgia facilities on the basis of race in hiring, assignment, promotion, and the acquisition and use of seniority (Pet. App. A-2). Shortly thereafter, the Attorney General filed suit against Terminal and the Teamsters International Union under Section 707 of Title VII, 42 U.S.C. 2000e-6, alleging that they had engaged in a "pattern or practice" of racial discrimination at Terminal's facilities nationwide.[1] The government action was subsequently consolidated with the Allen litigation (Pet. App. A-2 to A-3).

Three years after the two suits were filed, Terminal, the government, and the Allen plaintiffs entered into a "Consent Decree in Partial Resolution of Suit" approved by the district court on August 4, 1975 (Pet. App. A-30 to A-52; A-15 to A-16). The unions were not parties to this agreement (Pet. App. A-15). As a result of the agreement, Terminal provided relief in the form of back pay and job

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[1]The Equal Employment Opportunity Commission (EEOC) subsequently took over responsibility for the government's suit. See 42 U.S.C. 2000e-6(c) (Pet. App. A-98 to A-99). The government's suit did not name the local as a defendant but did name the International Association of Machinists (IAM).

The IAM filed an agreement with the court on October 9, 1973, stating that it would not defend and would abide by all orders to be issued by the court. It has not been an active participant in the suit since then. See Pet. App. A-54 n.1.

opportunities to 168 persons. Additionally, Terminal agreed to modify employment practices that had stood as obstacles to equal employment for blacks (Pet. App. A-15 to A-16). The decree provided for a $9,000 settlement to be paid counsel for private plaintiffs as attorney's fees and costs for negotiating the decree (Pet. App. A-3).

The issue of seniority was reserved for trial. At trial, the unions sought to show that neither they nor the company had violated Title VII or 42 U.S.C. 1981 (Pet. App. A-3, A-57, A-63). The district court held that both Terminal and the unions had violated Title VII, and ordered substantial retroactive seniority relief and assessed back pay against the unions (Pet. App. A-63 to A-65). In December 1977, after this Court's ruling in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) (*Teamsters*), the district court modified its order to vacate its ruling of union liability and to limit its award of retroactive seniority to the period commencing with the effective date of Title VII (Pet. App. A-73). The unions remained as defendants under Rule 19(a), Fed. R. Civ. P.

After the *Teamsters* decision, the sole issue remaining was the determination of seniority dates for class members entitled to such relief under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Teamsters*. As the court of appeals noted, the unions challenged every seniority date proposed by the plaintiffs (Pet. App. A-4). After an agreement

was ultimately reached on 33 claims, 13 disputed seniority claims were referred to a special master for resolution, along with two other personal claims and questions concerning the burden of proof as to vacancies and the use of retroactive seniority in bidding against laid-off employees. The unions also challenged the use of a special master, claiming that contractual grievance procedures should have been used instead (Pet. App. A-4 & n.6). The special master granted nine of the 15 contested claims, and ruled for the plaintiffs on the procedural issues (Pet. App. A-10). The district court taxed the unions and Terminal equally for the costs of the special master. The unions' share amounted to $2,256.00 (Pet. App. A-2).

Thereafter, the district court granted private counsel's motion for an award of attorney's fees. After determining that the general amount requested was appropriate, the court assessed one-third of that amount against the defendant unions, the balance to be paid by Terminal. The Teamsters were required to pay $16,767.05 (Pet. App. A-2). The court concluded that the unions should share the costs because "they participated substantially in opposing the legitimate demands of the plaintiff class * * *" (Pet. App. A-27). As the court explained, in language adopted verbatim by the court of appeals, "[w]hile the thrust of this suit was against Terminal, and even though after the decision in *Teamsters* it appeared that no relief would be ordered against them, the unions apparently felt they had a real and significant interest in the outcome of the cases. * * * Even in the proceedings to determine attorneys' fees they played an active part, often raising issues not mentioned by Terminal and briefing matters that have no bearing on the unions' liability for fees, such as the fee provision of the consent decree" (Pet. App. A-26; see also Pet. App. A-6).

The court of appeals affirmed, holding that the district court's findings were not clearly erroneous (Pet. App. A-8),

and that its assessment of a portion of the attorney's fees and costs of the special master against the unions was not an abuse of discretion (Pet. App. A-11). With respect to the unions' argument that they should not be held liable for any portion of attorney's fees since no one "prevailed" against them, the court of appeals held that "the unions, as Rule 19(a) parties, were liable for a fair share of the attorneys' fees in view of the nature and extent of their litigation and negotiation efforts, particularly where these efforts were identified with Terminal's interests" (Pet. App. A-5, A-8).

ARGUMENT

Awards of costs rest within the sound discretion of the trial court. Fed. R. Civ. P. 54(d); see also *Delta Air Lines* v. *August*, 450 U.S. 346 354-355 & n.14 (1981). The award of attorney's fees under Section 706(k) of Title VII, 42 U.S.C. 2000e-5(k), is also within the trial court's discretion; however, as this Court has held, "a prevailing plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978) (emphasis omitted); see also *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968), *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975). In this case, the plaintiffs clearly prevailed against the unions before the special master and in the general course of the litigation by obtaining substantial seniority relief, opposed by the unions, for victims of discrimination, regardless of the fact that an initial finding of union liability for back pay was vacated. The unions, in their role as Rule 19(a) defendants, substantially delayed the course of the proceedings by, among other things, contesting issues that had no bearing on any of their liabilities. In these circumstances, the court of appeals correctly held that the district court acted within its discretion in refusing to award the unions their costs, and in assessing the unions for one-third of the attorney's fee award and one-half of the costs of the special master.

The unions contend that they cannot be made to pay attorney's fees or costs because the plaintiffs did not "prevail" against them. However, in relief proceedings, the plaintiffs prevailed in restructuring the unions' seniority rosters (Pet. App. A-7, citing Pet. App. A-22). As both the district court and the court of appeals found, the plaintiffs prevailed on the majority of the contested seniority dates put before the special master, as well as prevailing in that forum, "over opposition by the unions, on the questions of burden of proof and priority of seniority" (Pet. App. A-4; see also Pet. App. A-21). Thus, the plaintiffs achieved substantial gains over union opposition, even though they were ultimately unsuccessful in their claim for back pay from the unions and their effort to obtain retroactive seniority to before the implementation of Title VII. A plaintiff need not prevail on all claims in order to be a "prevailing party" within the meaning of the Act. See *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 429-430 (8th Cir. 1970) (42 U.S.C. 2000e-5(k)); *Dawson* v. *Pastrick*, 600 F. 2d 70, 78-79 (7th Cir. 1979) (42 U.S.C. 1988).

It is established that there need not be a formal finding either of liability or that the defendant is a law breaker in order to award plaintiffs attorney's fees under Section 706(k) of Title VII or under 42 U.S.C. 1988.[2] As this Court held in *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980), "[n]othing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." Accord *Hanrahan* v. *Hampton*, 446 U.S.

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[2]The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, is "legislation similar in purpose and design to Title VII's fee provision." *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 71 n.9 (1980).

754, 756-757 (1980); *Delta Air Lines* v. *August, supra*, 450 U.S. at 362-364 (Powell, J., concurring).[3]

The unions' assertion that their status as Rule 19(a) defendants precludes any award against them is equally unavailing. Contrary to their contention that their role as Rule 19(a) parties was to aid the resolution of the litigation, the district court found that "had the unions not been so steadfast in their opposition this controversy might have ended sooner. * * * [F]ees are not being taxed against the unions because the seniority system perpetuated discrimination, albeit innocently; rather they participated substantially in opposing the legitimate demands of the plaintiff class * * *" (Pet. App. A-27; accord Pet. App. A-6 to A-7). The awards of fees in such unusual circumstances is neither unauthorized nor likely to have a disruptive effect on participation by unions as Rule 19(a) parties at the remedial stage

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[3]Accordingly, every court of appeals that has considered the question has approved an award of attorney's fees where there was no judicial finding of liability, but where the plaintiff's action served as a catalyst to relief. See, *e.g.*, *Foster* v. *Boorstin*, 561 F. 2d 340 (D.C. Cir. 1977); *Nadeau* v. *Helgemoe*, 581 F. 2d 275 (1st Cir. 1978); *Sullivan* v. *Pennsylvania Bureau of Vocational Rehabilitation*, 663 F. 2d 443, (3d Cir. 1981); *Bonnes* v. *Long*, 599 F. 2d 1316 (4th Cir. 1979); *Iranian Students Ass'n* v. *Sawyer*, 639 F. 2d 1160 (5th Cir. 1981); *Dawson* v. *Pastrick, supra*; *Parham* v. *Southwestern Bell Telephone Co., supra*; *American Constitutional Party* v. *Munro*, 650 F. 2d 184 (9th Cir. 1981).

Petitioners' reliance (Pet. 10-11) on *Hanrahan* v. *Hampton, supra*, is wholly inapt. *Hanrahan* held that in order to merit an award of *interim* attorney's fees a party must have "established his entitlement to some relief on the *merits of his claims*" *as a result of an interlocutory order* (446 U.S. at 757 (emphasis added)), rather than merely have obtained a procedural ruling that permits the plaintiff to bring his case to trial. *Id.* at 758. In the instant case, the award of attorney's fees came after the merits had been adjudicated through proceedings that were strongly contested by the unions at every stage (see Pet. App. A-6) and the plaintiffs prevailed on the merits of a majority of their claims.

in future Title VII proceedings. Other courts of appeals have held that participants in a lawsuit, some of whom had less of a stake in the outcome than did the unions here, can be required to pay attorney's fees where their participation served to prolong unduly the proceedings. See *Haycraft* v. *Hollenbach*, 606 F. 2d 128 (6th Cir. 1979) (attorney's fees under Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. 1617, assessed against an intervenor who was not a party to the original action and whose participation served to prolong the proceedings); *Moten* v. *Bricklayers, Masons & Plasterers, Etc.*, 543 F. 2d 224, 239 (D.C. Cir. 1976) (attorney's fees assessed against nonparty whose efforts to block entry of a settlement agreement led to a prolongation of the final resolution of the issues).

As the court of appeals correctly noted (Pet. App. A-6), the unions' "self-serving" description of their posture during the course of the litigation, echoed in their statement (Pet. 12) that they agreed "in the main" with plaintiffs' positions as to seniority, is belied by the tenacity of their defense of positions they deemed to be in their interest. This included, as both the district and appellate courts noted, asserting positions that had no relation to their own potential liabilities (Pet. App. A-6). The unions' special interest in preserving the seniority system can not immunize them from sharing liability for fees and costs where, as here, an excess of zeal led them unsuccessfully to contest plaintiffs' rightful seniority claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-1126

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and
TERMINAL TRANSPORT COMPANY, INC.
and
UNITED STATES OF AMERICA and EQUAL
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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITIONERS' REPLY TO OPPOSITIONS TO PETITION FOR CERTIORARI

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PETITIONERS' REPLY TO OPPOSITIONS TO PETITION FOR CERTIORARI

Respondents' attempt to avoid review here actually demonstrate the need for review. We reply separately to the filings of the private plaintiffs and the Government.

REPLY TO PRIVATE PLAINTIFFS

I.

The Basic Issue

Respondents insist (Op. Cert. p. 12) ". . . the fact that a party has not violated the underlying statute is not dispositive . . ." of the question as to whether Plaintiffs' attorney's fees must be paid by a prevailing Defendant.

Yet, repetitively this Court has held that Section 706(k) allows fee awards "only to the *prevailing* private plaintiffs . . .", and the emphasis in this Court's, 434 U.S. 412 at 422. To "prevail" requires prevailing on the merits. A party so "prevails" for the purpose of entitlement to attorney's fees only when it is established that the party against whom attorney's fees are to be awarded has committed a statutory violation. *Hanrahan*[1] (446 U.S. 754 at 758) reiterates at note 4 what this court held in *Christianburg:*

> "[W]hen a district court awards counsel fees [under the Civil Rights Act of 1964] to a prevailing plaintiff, it is awarding them against a violator of federal law. 434 U.S. 412, 418 (1978)."

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[1] *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980); See also *Roadway Express* v. *Piper*, 447 U.S. 752 (1980); *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978).

Respondents' attempt to distinguish *Hanrahan* (Op. Cert., pp. 8-9) is frivolous. In *Hanrahan*, the lower court's award of lawyer fees was based on interlocutory rulings favorable to plaintiffs. This Court set aside those fee awards, holding that to obtain fees one must prevail on the merits.

A fortiori, where, as here, petitioner unions have prevailed on the merits, they can not be held for their adversaries' lawyer's fees unless the court is to depart from its *Hanrahan* opinion.

Respondents make no suggestion as to how they can avoid this Court's *Christianburg* and *Roadway* opinions.

II.

Importance of the Issue

(a)

Respondents likewise err in asserting that the issue here "is unlikely to recur in the future" since, Respondents say, *Franks* and *Teamsters* have "clarified" the law to the extent that "they [unions] no longer can be held liable in their own right." (Op. Cert., p. 14).

From this admission that Plaintiffs cannot "prevail" against unions which have negotiated *bona fide* seniority systems, it does not follow that the issues here are unlikely to recur. To the contrary, while the decisions below remain unreviewed, every union which bargains for a *bona fide* seniority system is in jeopardy of being mulcted for civil rights plaintiffs lawyer fees if it dares to advise the Court of the position to which the victims of the guilty employer's violation should be slotted in the *bona fide* seniority system.

(b)

Respondents suggest (Op. Cert., p. 12) that employers are more likely to settle Title VII cases if the innocent unions can be held liable for plaintiffs attorney's fees. Thus, the "incentive to support the voluntary resolution of litigation" is removed, Respondents say, unless innocent unions are required to pay their unsuccessful adversaries' lawyers, (Op. Cert., p. 12). But the statute does not permit taxing the innocent defendant for what the guilty defendant has done.

Moreover, what Respondents really assert here is: "If the union will just remain silent while the guilty employer buys his way out of a civil rights violation by settlement granting more seniority than is justified under the collective bargaining agreement, there will be more settlements." This is in the face of the national policy to promote the practice of collective bargaining,

and to enforce collective bargaining agreements. More importantly, there are innocent incumbent employees whose collective bargaining rights are impaired if racial victims are assigned more seniority than their rightful place dictates. See *Franks* v. *Bowman*, 424 U.S. 747, the Opinions of the Chief Justice at 780-81, and of Mr. Justice Powell at 790 ff.).

For the unions (required to remain in the case by Court Order) to sit mute while the plaintiffs and the guilty employer agree to give away innocent incumbent employees' lawful seniority[2] may settle more cases, but it undermines the national policy by which collective bargaining agreements are to be honored, and it is likely to assure that innocent employees will be deprived of lawful, contractually provided seniority.

So viewed, it becomes clear that Respondents really argue here for a sanction, contrary to the statute and the decided cases, by which guilty employers and civil rights plaintiffs may agree to usurp the lawful seniority status of innocent employees.

III.

The Findings Below

The Op. Cert. redundantly implies that there are factual findings below that the Plaintiffs prevailed on the merits against the Unions. Indeed, Respondents in their zeal to avoid review here assert that the plaintiffs prevailed in the case and "*relief was ordered by the court against the unions.*" (Sic! Op. Cert., p. 10)

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[2] In this very case plaintiffs insisted that seniority be enhanced for *all* blacks as a class, and, more than a year after the *Teamsters* decision, refused to limit individual retroactive seniority to the effective date of the Act. (Order, June 27, 1978, App. 76). Plaintiffs-respondents' June, 1978 agreement to certain seniority dates was qualified:

> The Agreement of the *Allen* Plaintiffs to those seniority dates is without prejudice to their previously asserted claims for pre-1965 seniority. *Ibid.*

This is grossly inaccurate! Actually, as Respondents' attorney *admitted*, plaintiffs "did not prevail" on any claims "made on behalf of the Georgia plaintiffs against the unions . . ." See record excerpts quoted at p. 8, ftnt. 19 of Petition for Certiorari.

Moreover, the Final Judgment (App. 87-90) provides no relief against the Unions, except the fee awards and Master's fees of which we here complain. [3]

Actually, that Final Judgment reiterates that the district court is "vacating the previous findings of liability of defendant [unions] . . ." (App. p. 88, ¶ 7).

REPLY TO THE GOVERNMENT'S OPPOSITION TO PETITION FOR CERTIORARI

What we have said above serves in large part as reply to the Government's later-filed Opposition.

1.

The Government recasts the "question presented" and then twists the record in an attempt to justify the revised issue. Redundant assertion by both Respondents that "Plaintiffs prevailed in obtaining significant rightful place seniority over the Unions' steadfast opposition" does not make it so.

Actually, neither Plaintiff had prevailed as against the Unions when, after five years of hard fought litigation, the Trial Court found the Unions innocent of all wrongdoing and ordered them to remain in the litigation only as Rule 19(a) parties.

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[3] In fixing the four disputed individual seniority dates, the Master denied the claims of three, and awarded individual enchanced seniority to one.

Determination as to appropriate remedy — (where to slot individuals in a lawful seniority system) is not adverse determination of liability, nor is it the grant of any relief against the union.

The Court thereupon ordered the Plaintiffs to list individuals claiming enhanced seniority and reasons therefore with supporting demands (App., p. 75, ¶ 7), "directed" Defendant Unions to submit challenges to seniority dates *(Ibid,* ¶ 8), and required the parties then to meet to reconcile differences *(Ibid,* ¶ 9).

The record is silent as to the meeting of the parties, at which there was agreement as to the seniority to be awarded to all but four of the Georgia claimants. The record does disclose the results of the meeting, including the Unions' agreement to all but four of the individual slottings, and Plaintiffs' reluctance (more than one year after the Supreme Court's *Teamsters* decision) to limit retroactive seniority to the effective date of the Act (see App., p. 76, Order of June 27, 1978).[4]

The Government's assertion in these circumstances (Op. Cert., p. 5), "The Plaintiffs clearly prevailed against the Unions before the Special Master and in the general course of the litigation . . ." is thus misleading, if not grossly inaccurate.

2.

The Government's assertion that the Plaintiffs prevailed in "restructuring the Union's seniority rosters" (Op. Cert., p. 6) is likewise misleading. The slotting of the employer's racial victims into the lawful seniority system was with the Unions' agreement except only as to a single claimant.

3.

The Government asserts that there need not be a formal finding of liability in order to award Plaintiffs' fees (Op. Cert., p. 6). But a finding of *no liability* can hardly be equated with the absence of a formal finding.

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[4] It is there recorded, "The agreement of the Allen (Georgia) Plaintiffs to those seniority dates is without prejudice to their previously asserted claims for pre-1965 seniority."

4.

Strangely, neither Respondent addresses the root question: Should the guilty employer be relieved of a portion of the Plaintiffs' lawyer's fees made necessary by the employer's law violation; may a portion of that burden be shifted to the innocent defendant?

CONCLUSION

WHEREFORE, the Petition for Certiorari should be granted.

Respectfully submitted,

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